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Judicial mediation and Ch III of the Commonwealth Constitution

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JUDICIAL MEDIATION AND CH III OF THE COMMONWEALTH CONSTITUTION

IAIN D FIELD

A thesis submitted in fulfilment of the requirements
for the award of the degree of Doctor of Philosophy

FACULTY OF LAW, BOND UNIVERSITY
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SIGNED CERTIFICATION

This thesis is submitted to Bond University in fulfilment of the requirements for the Degree of Doctor of Philosophy.

This thesis represents my own work, except where due acknowledgement is made, and contains no material which has been previously submitted for a degree or diploma at this University or any other institution.

Iain Field

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ABSTRACT

The judicial process is neither static nor uniform. In recent years, judicial control over the civil trial process has become increasingly apparent. Judges are now frequently involved in the provision (either directly or by referral) of alternative dispute resolution ('ADR') processes. The individual reforms which punctuate this increase are often referred to as 'access to justice' reforms, and respond to concerns regarding the cost and quality of adversarial litigation. One such reform, and the focus of this thesis, is a process described as 'judicial mediation'. Judicial mediation falls within the 'third-wave' of the access to justice movement, and has the potential to improve the quality and efficiency of civil litigation.

This thesis examines judicial mediation from a constitutional and jurisprudential perspective. More specifically, it asks whether Ch III of the Commonwealth Constitution limits the capacity of Australian judges to engage in judicial mediation and, if so, how this will affect the development of judicial mediation in practice. The idea of judges mediating can be controversial, and calls for a re-examination of certain underlying assumptions regarding the nature of the judicial process. Many of the issues raised by judicial mediation also reflect broader practical and jurisprudential questions common to other third-wave reforms, including case management (in particular prehearing conferences), court-connected ADR, and less adversarial trial procedures.

It has been argued that judicial mediation will conflict with certain inviolable precepts and conditions of the common law judicial process; in particular the principles of

procedural fairness and the integrity of the judiciary. Certain of these requirements have been identified as implications of Ch III. On this basis, it has been suggested that federal judges cannot mediate, that judicial mediation is ‘incompatible’ with the ‘status and role’ of State and territory courts as repositories of federal judicial power, and that private mediation by an active judge would be ‘incompatible’ with the performance of his/her judicial functions. This thesis demonstrates that, in practice, it is highly unlikely that judges will be prohibited from mediating by the requirements of Ch III in any of these contexts.

Many of the concerns voiced in relation to judicial mediation are fuelled by the belief that mediation and adjudication are somehow dichotomous, and that the term ‘judicial mediation’ is therefore oxymoronic. These views reflect an early tendency to define mediation in contradistinction with litigation. The reality, demonstrated in this thesis, is that mediation and adjudication are more aptly described as theoretical constructs which occupy opposing ends of the same ‘procedural continuum’. The question is not whether judges can ‘mediate’, but how far towards the mediation end of this continuum judicial participation can travel before the boundaries of acceptable conduct are exceeded. In practice, simple strategies can be adopted to minimise any risk of apprehended bias arising, or of damage being sustained to the integrity of the judicial institution.

Perhaps more importantly, this thesis demonstrates that the ultimate object of Ch III would not be served by the prohibition of judicial mediation. It is shown that the High Court’s approach to Ch III can be framed as an attempt to maintain and expand four essential jurisdictions; exclusive, inherent, appellate and supervisory. These

jurisdictions serve the rule of law by insulating the judiciary and the judicial process from governmental interference (exclusive and inherent jurisdiction), by ensuring an avenue of appeal to the High Court from all Australian Courts (appellate jurisdiction), and by securing the judiciary's overarching authority in all spheres of Australian dispute resolution (supervisory jurisdiction). This thesis demonstrates that judicial mediation poses no threat to any of these jurisdictions and that, on the contrary, judicial mediation has the potential to further the rule of law by increasing the efficiency and quality of dispute resolution in independent and impartial tribunals.

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CHAPTER 1

INTRODUCTION

The purpose of this preliminary Chapter is to introduce certain of the key themes and concepts which underpin and direct the analysis undertaken in the following Chapters. The Chapter begins by developing a working definition of the term ‘judicial mediation’, and goes on to identify areas of potential conflict (pressure points) in the relationship between judicial mediation and the fundamental principles that govern the judicial function. The second part of this Chapter demonstrates that, appropriately implemented and monitored, judicial mediation has the potential to improve the efficiency and quality of civil litigation.

What is ‘judicial mediation’?

Some of the earliest references to judicial mediation appeared in the US during the mid-1980s,¹ and commentary on the subject has increased steadily in Australia² and overseas³ in the years since. Nevertheless, and despite the fact that a number of

¹ See, for example, Marc Galanter, ‘A settlement judge, not a trial judge: judicial mediation in the United States’ (1985) 12(1) *Journal of Law and Society* 1; Marc Galanter, ‘The Emergence of the Judge as a Mediator in Civil Disputes’ (1986) 69 *Judicature* 257.

² See, for example: Sir Laurence Street, ‘The Courts and Mediation – A Warning’ (1991) 2 *Australian Dispute Resolution Journal* 203; Chief Justice Michael Black, ‘ALJ Forum: Mediation’ (1993) 67 *Australian Law Journal* 941; Tania Sourdin, ‘Judicial Management and Alternative Dispute Resolution Process Trends’ (1996) 14 *Australian Bar Review* 185; Sir Laurence Street, ‘Mediation and the Judicial Institution’ (1997) 71 *Australian Law Journal* 794; Phillip Tucker, ‘Judges as Mediators: A Chapter III Prohibition?’ (2000) 11 *Australian Dispute Resolution Journal* 84; Justice Michael Moore ‘Judges as Mediators: A Chapter III Prohibition or Accommodation?’ (2003) 14 *Australian Dispute Resolution Journal* 188; David Spencer, ‘Judicial Mediators: Are they Constitutionally Valid?’ (2006) 9(4) *ADR Bulletin* 1; David Spencer, ‘Judicial Mediators: Is the time right? – Part 1’ (2006) 17 *Australian Dispute Resolution Journal* 130; David Spencer, ‘Judicial Mediators: Is the time right? – Part 2’ (2006) 17(4) *Australian Dispute Resolution Journal* 189.

³ See generally: Hiram Chodosh, ‘Judicial Mediation and Legal Culture’ (1999) 4(3) *Issues of Democracy*. (Electronic Journal of the USA Department of State)
<<http://usinfo.state.gov/journals/itdhr/1299/ijde/ijde1299.htm>> at 5 October 2006; Hugh Landerkin and

Australian courts ostensibly engage in the practice,⁴ the precise definition of ‘judicial mediation’ remains uncertain. Uncertainty arises for two reasons in particular: because mediation, and the relationship between mediation and adjudication, is difficult to define, and because there are jurisdictional variations as to what makes judicial mediation ‘judicial’.

What is Mediation?

The taxonomy of alternative dispute resolution (‘ADR’) processes is imprecise,⁵ and various definitional approaches can be identified in the literature. One methodology commonly adopted is to differentiate between broad procedural models or ideologies.⁶ According to the National Alternative Dispute Resolution Advisory Council (‘NADRAC’), for example, dispute resolution processes can be classified according to three overarching categories; facilitative, advisory/evaluative and determinative:

- Facilitative processes involve a third party, often with no advisory or determinative role, providing assistance in managing the process of dispute resolution. These processes include mediation and facilitation.

Andrew Pirie, ‘Judges as Mediators: What’s the Problem with Judicial Dispute Resolution in Canada?’ (2003) 82(2) *Canadian Bar Review* 249; Justice Louise Otis and Eric H. Reiter, ‘Judicial Mediation in Quebec’ in Nadja Alexander (ed), *Global Trends in Mediation*, (2nd ed 2006) 107, at 110-111; Alain Lacabarats, ‘The role of mediation in French judicial practice’ (Paper presented at the inaugural meeting of the European Commercial Judges Forum: New Approaches to the Efficient Management by the Courts of Commercial Litigation, Paris, 15 October 2003).

⁴ The extent to which judicial mediation occurs in Australia is discussed in detail in Chapter 8.

⁵ This proposition is widely acknowledged in the literature. See, for example: Tania Sourdin, *Alternative Dispute Resolution* (2005), 26; David Spencer and Michael Brogan, *Mediation Law and Practice* (2006), 4; Laurence Boulle, *Mediation: Principles Process Practice* (2005), 4-6; Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, (2nd ed, 2002), 135.

⁶ Carrie Menkel-Meadow, ‘The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices’ (1995) 11 *Negotiation Journal* 217, 228 – 230; Boulle, above n 5, 43.

- Advisory processes involve a third party who investigates the dispute and provides advice on the facts and possible outcomes. These procedures include investigation, case appraisal and dispute counselling.
- Determinative processes involve a third party investigating the dispute, which may include a formal hearing, and the making of a determination which is potentially enforceable. These processes include adjudication and arbitration and may be binding or non-binding.⁷

These overarching categories are referred to frequently throughout this thesis, as they provide a useful interface between constitutional and ADR theory. NADRAC has further defined mediation by identifying the core elements of that process. According to NADRAC, mediation is

a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.⁸

⁷ National Alternative Dispute Resolution Advisory Council (NADRAC) *Dispute Resolution Terms* (AGPS, Canberra, September 2003), 4. See also, Tania Sourdin, *Alternative Dispute Resolution* (2005), Ch 2.

⁸ NADRAC, *Alternative Dispute Resolution Definitions* (1997) 5.

The model described by NADRAC reflects a ‘standard’⁹ or ‘classical’¹⁰ mediation model, which is purely facilitative in nature.¹¹ There is some debate as to whether mediation might not, in certain circumstances, involve an advisory or evaluative function.¹² The nature of mediation is examined in more detail below, at which point it is demonstrated that, in practice, mediation is often evaluative in nature. It is generally accepted, however, that a mediator should have no determinative function.¹³ ‘Self-determination’ is often identified as a core ‘value’¹⁴ or ‘philosophy’¹⁵ of mediation; in contrast with adjudication, which is characterised by the provision of a ‘binding and authoritative decision’.¹⁶ This point is critical to the analysis undertaken in the following Chapters, and is worth repeating for the sake of clarity: mediators (or judge-mediators in the case of judicial mediation) do not determine disputes. For this reason, judicial mediation may be classified as a ‘prehearing’ function.¹⁷

Another central feature of mediation, commonly included in definitions of the concept, is that mediators should be neutral and unbiased.¹⁸ This fact is significant because, as will be seen, impartiality is also a (arguably the) core feature of formal adjudication.¹⁹

Tania Sourdin states that, ‘at its simplest, mediation involves the intervention of a

⁹ Boulle, above n 5, 171.

¹⁰ Spencer and Brogan, above n 5, 49.

¹¹ Sourdin, *Alternative Dispute Resolution*, above n 5, 26 – 7.

¹² As Tania Sourdin has explained, for example, evaluative mediation, ‘or as it is also known in the United States, “muscle”, “rhino” or “rambo” mediation ... may not offer the same empowerment opportunities’. Sourdin, *Alternative Dispute Resolution*, above n 5, 28.

¹³ Simon Roberts, ‘Mediation in Family Disputes’ (1986) 46 *Modern Law Review* 537, 546; Boulle, above n 5, 65; Sourdin, *Alternative Dispute Resolution*, above n 5, 26.

¹⁴ Boulle, above n 5, 60-67; Sourdin, *Alternative Dispute Resolution*, above n 5, 28.

¹⁵ Ruth Charlton identifies five ‘philosophies’ of mediation: ‘confidentiality’, ‘voluntariness’, ‘empowerment’, ‘neutrality’, and ‘a unique solution’. Ruth Charlton, *Dispute Resolution Guide Book* (2000), 14-15. See also Spencer and Brogan, above n 5, 83-100.

¹⁶ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ). The ‘primary indicia’ of judicial power are identified and discussed in Chapter 3.

¹⁷ The term prehearing is adopted in preference to the term ‘pretrial’, as the latter is apt to suggest processes that take place prior to filing, as opposed to processes that take place between filing and the final hearing.

¹⁸ Spencer and Brogan, above n 5, 91-99.

¹⁹ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [79] (Gaudron J).

trained, impartial third party ... who will assist the parties to reach their own solutions'.²⁰ As noted above, neutrality is also central to the definition of mediation provided by NADRAC, and Hugh Landerkin and Andrew Pirie have expressed the view that a 'neutral and unbiased third party with no authoritative decision-making power and a final say resting with the parties themselves are characteristics [of mediation] that survive in a wide variety of procedural milieus'.²¹

Thus, unless a process involves an impartial third party with no decision-making power – that power remaining with the disputants – it cannot be classified as 'mediation'.²² Although this negative definition fails to accommodate the variety of mediation processes that exist in practice, it provides a suitable starting point for analysis. Some of the subtleties of the mediation process are examined in more detail below. Before doing so, however, it is important to clarify why judicial mediation is described as 'judicial'. Judicial mediation has never been authoritatively defined in an Australian context, but it has been defined in other jurisdictions, and it is necessary (in order to avoid any confusion) to distinguish the model that is developing in Australia from the models that have developed overseas. A few select examples suffice for this purpose.

What makes Mediation 'Judicial'?

In France, judicial mediation involves the appointment of an independent mediator within the formal court system. The mediator in this model is not the judge him or herself, but a fourth party who mediates between the disputants in the presence of the

²⁰ Sourdin, *Alternative Dispute Resolution*, above n 5, 26.

²¹ Landerkin and Pirie, above n 3, 256.

²² Boule, above n 5, 13.

judge. The ‘judicial’ nature of the French model therefore derives from the integration of the mediation process within the formal court system, as opposed to the identity of the mediator. Free from the normal restrictions of adversarial practice, the independent mediator’s only procedural obligations under the revised French Civil Procedure are,²³

to meet the time-limit that he has been set for carrying out his duties and to comply strictly with the rules of confidentiality which prohibit him, in particular, from informing the judge or third parties of any compromise proposals that the parties have put forward to him.²⁴

The French system of judicial mediation is designed to ensure the maintenance of judicial impartiality, and the judge’s role in the mediation is limited to deciding whether the dispute is suitable for mediation (barring matters concerning ‘public policy’ which cannot be mediated), the length of the mediation (within legislative limits), the identity of the mediator, and the enforceability of the final decision.²⁵

In contrast with the French model, it is a common (and defining) feature of most models of judicial mediation that the judge fulfils the role of mediator him/herself. The *Quebec Civil Code of Civil Procedure*, for example, provides judges at ‘every level and in virtually every area of law’²⁶ with the power to preside over a ‘settlement conference’ at the request of the parties.²⁷ According to Louise Otis and Eric Reiter, ‘judicial mediation’ in the Quebec Court of Appeal occurs, ‘within the framework of

²³ *French Code of Civil Procedure*, Articles 131-1 – 131-15.

²⁴ Lacabarats, above n 3, 2-3.

²⁵ Ibid.

²⁶ Justice Louise Otis and Eric H. Reiter, ‘Judicial Mediation: A New Phenomenon in the Transformation of Justice’ (2005) (Unpublished), 3.

²⁷ *Quebec Civil Code of Civil Procedure*, RSQ 2009 c-25.

the traditional adversarial system ... [with] ... a judge ... conducting the mediation'.²⁸

Justice Otis has argued that the *Quebec Civil Code of Civil Procedure* implements the purest example of 'judicial mediation' yet developed.²⁹

In common-law jurisdictions such as Australia, Canada (excluding Quebec) and the US, the judicial nature of judicial mediation would also appear to derive from the identity of the mediator. In the US, however, the term may be used to refer to all forms of judge-led mediation whether integrated or not and whether conducted by an active or retired judge. According to Hiram Chodosh, judicial mediation refers to 'a confidential, consensual form of dispute resolution facilitated by a sitting or retired judge who is trained in conflict resolution'.³⁰ On this definition, judicial mediation is 'judicial' first and foremost because of the identity of the mediator, and does not hinge upon whether that process is integrated with the court system.

Hugh Landerkin and Andrew Pirie argue that the Canadian model of judicial mediation is narrower than the US model, because

mediating judges [in Canada] are not members of the increasing ranks of "rent-a-judges" in North America who have left the bench to pursue rewarding second or third careers as private sector arbitrators and mediators. The judges we are referring to will be sitting s. 96 superior court judges appointed by the

²⁸ Justice Louise Otis and Eric H. Reiter, 'Judicial Mediation in Quebec' in Nadja Alexander (ed), *Global Trends in Mediation*, (2nd ed 2006) 107, at 110-111. Justice Otis has previously defined mediation as occurring 'where sitting judges themselves act as mediators in programs *closely integrated* with the traditional adjudicative system'. (Justice Louise Otis and Eric H. Reiter, above n 26). For an earlier analysis of Quebec's judicial mediation/conciliation program see also, Louise Otis, 'Alternative Dispute Resolution: Judicial Mediation' (Paper prepared for the European Conference of Judges: Early Settlement of Disputes and the Role of Judges, 2003, Strasbourg) 5.

²⁹ Otis and Reiter, 'Judicial Mediation in Quebec', above n 28. Whether settlement conferences may be classified as a form of judicial mediation is considered in Chapters 7 and 8.

³⁰ Chodosh, above n 3.

Governor-in-Council, at the trial and appellate levels, and sitting s. 92

Provincial or Territorial Court judges appointed by a Province or Territory.³¹

The same is true in Australia, where a number of the country's most established and high-profile private mediators are retired judges,³² and where the majority of literature consequently pre-supposes that judicial mediators are active judges.³³ According to David Spencer, for example, judicial 'mediators [in Australia] are appointed judges of the respective court but assigned the task of mediating as opposed to adjudicating cases before the court'.³⁴ This definition corresponds with the judicial mediation programs introduced in certain State courts over the past few years, including the Supreme Court of South Australia, the Supreme Court of Western Australia,³⁵ and the District Court of New South Wales.³⁶ These programs are considered in more detail in Chapter 8. For the reasons provided at that stage, however, it is debatable whether judge-mediators must be excluded from subsequently adjudicating the same case. At this stage no assumption is made as to whether judge-mediators are excluded from subsequent adjudication by Ch III, and the following Chapters countenance either possibility.

The preceding analysis can be condensed to reveal the following working definition of judicial mediation: judicial mediation is a prehearing process in which an active

³¹ Landerkin and Pirie, above n 3, 251.

³² There are a number of practical implications of this including the danger that judges may retire in order to 'seek more a more lucrative career in the private dispute resolution'. Hiram Chodosh, above n 3.

³³ See above n 2.

³⁴ Spencer, 'Judicial Mediators: are they constitutionally valid?', above n 2, 61.

³⁵ Supreme Court of Western Australia, *Supreme Court Mediation Programme* (Practice Direction No 2 of 2008), now contained in the Supreme Court of Western Australia, *Consolidated Practice Directions* (22nd January 2009), PD 4.2.1.

³⁶ Judge Margaret Sidis, 'Judicial Mediation in the District Court' (2006) 18(9) *Judicial Officers Bulletin* 74; Letter from Judge Margaret Sidis to Iain Field, 20th August 2009. See Appendix.

judge (the ‘judge-mediator’) attempts to guide opposing parties towards an outcome to which they can both assent. The judicial mediation process takes place as part of the formal court process, but does not involve the provision of a binding determination by the judge-mediator.

How might Judicial Mediation undermine the requirements of Ch III?

How, then, might judicial mediation conflict with the requirements of Ch III? By sketching the outer boundaries of mediation practice, three overlapping ‘pressure points’ can be identified in the relationship between mediation and the judicial function; the participation of the judge-mediator,³⁷ the privacy of the mediation process, and the confidentiality of proceedings. These pressure points serve as waypoints by which to navigate and chart the streams of Ch III jurisprudence that will control the development of judicial mediation.

³⁷ It is common for lawyers and judges to describe judicial involvement in the legal process as an ‘intervention’. See, for example: Justice David Ipp, ‘Judicial Intervention in the Trial Process’ (1995) 69 *Australian Law Journal* 36; Justice Andrew Rogers, ‘The managerial or interventionist judge’ (1993) 3 *Journal of Judicial Administration* 97. The same term has been adopted by ADR theorists to categorise the techniques adopted by mediators. For example, Laurence Boulle adopts the term intervention to refer to ‘the actions or responses which mediators make to particular situations, problems or crises in the interactions between the disputing parties’. See above n 5, 36. However, in constitutional discourse the term ‘interventionism’ is synonymous with judicial activism and legal realism, and in ADR circles there has been ‘considerable debate as to the appropriate and legitimate degree to which mediators can “intervene” in the process of conducting mediations’. See, for example Simon Roberts, ‘Toward a Minimal Form of Alternative Intervention’ (1986) 11 *Mediation Quarterly* 25; Russell Thirgood ‘Mediator Intervention to Ensure Fair and Just Outcomes’ (1999) 10 *Australian Dispute Resolution Journal* 142; Henry Brown and Arthur Marriot, *ADR Principles and Practice* (2nd ed, 1999) 138-140. In short, the word ‘intervention’ has particular, disparate and often negative connotations in both disciplines. These connotations have the potential to detract from what is intended to be a neutral analysis of mediation vis-à-vis the rule against bias. For this reason the term ‘participation’ is adopted to describe the role of judges during mediation. This term is also considered preferable as it avoids the suggestion (implicit in the term ‘intervention’) that the role of the mediator is somehow external to the dispute resolution process.

Variations in Mediation Practice

The classical (facilitative) model of mediation described above is a useful analytical archetype, but it does not reflect the wide variety of forms that mediation may take in practice, and which will vary depending upon ‘the purpose for which mediation is used and the theoretical, or operational, perspective of the mediator’.³⁸ The Australian National Mediator Standards developed by NADRAC acknowledge this fact, but continue to define mediation as a purely facilitative process.³⁹ In a recent Issues Paper, NADRAC stated that:

The Standards also explain that ‘blended processes’, ie processes that blend mediation with an ‘advisory’ component like expert information or advice, are more properly defined as ‘conciliation’ ‘advisory mediation’ or ‘evaluative mediation’. It is hoped that over time the Standards will encourage greater consistency in how the term mediation is used.⁴⁰

It is unclear why, precisely, NADRAC consider greater consistency to be important.

For some commentators, maintaining a robust distinction between the classical

³⁸ Boulle, above n 5, 48. Ruth Charlton and Michelene Dewdney open their text by stating that there ‘is no universally accepted model of mediation’. *The Mediator’s Handbook: Skills and Strategies for Practitioners* (2nd ed 2004), 3. Spencer and Brogan, above n 5, 459, similarly state that, while ‘mediation purists, schooled in classical mediation processes, decry any move away from the effective but restrictive classical model of mediation – where opening statements are delivered like an over-rehearsed Shakespearean soliloquy and separate sessions are conducted in as ritualistic a manner as Catholic Mass – the mediation realists mourn the opportunities lost through a rigid adherence to a process valued for its flexibility. The hybrid forms of mediation are as many and varied as the individuals and organisations that have benefited from them’. NADRAC acknowledges that in ‘practice ... the term mediation is often used in instances where the dispute resolution practitioner gives advice on the substance of the dispute’. See also Menkel-Meadow, ‘The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices’, above n 6.

³⁹ ‘Some mediators may also use a “blended” process that involves mediation and incorporates an “advisory” component, or a process that involves the provision of expert information and advice, where it enhances the decision-making of the participants provided that the participants agree that such advice can be provided. Such processes may be defined as “conciliation” or “evaluative mediation.”’ Australian National Mediator Standards, *Approval Standards* (2008) 5.

⁴⁰ NADRAC, *Alternative Dispute Resolution in the Civil Justice System*, NADRAC IP (2009), 6 [2.20].

mediation model and other forms of dispute resolution is necessary for ethical reasons; in order to keep disputants fully informed as to the nature of the process undertaken.⁴¹

Whatever the motivation, this goal is likely to prove illusory. Most academic commentaries on the 'evaluative/facilitative debate'⁴² conclude that ideological distinctions between dispute resolution processes are often facile in practice, and that the classical mediation model 'has begun to unravel ... as mediation has grown up in popularity, and especially as the practice has become increasingly intertwined with the legal system'.⁴³ In part, the erosion of the classical model may reflect the fact that:

In some situations there will be an expectation that they [the mediator] perform some kind of evaluative function, for example, where parties select mediators with expertise in the substantive issues in dispute to provide a platform on which they can build a settlement. Thus an engineer mediator could be expected to express an opinion on the cause of a construction problem and a lawyer mediator a prediction of a court's likely view on the liability question.⁴⁴

⁴¹ Kimberlee Kovach and Lela Love, 'Mapping Mediation: the Risks of Riskin's Grid' (1998) 3 *Harvard Negotiation Law Review* 71. See also Kimberlee Kovach and Lela Love, "'Evaluative" Mediation is an Oxymoron' (1996) 14 *Alternatives to High Cost Litigation* 31. The first article listed responds to an article by Leonard Riskin, who posits that the strategies and techniques employed by mediators can be represented on a 'facilitative-evaluative' continuum: Leonard Riskin, 'Understanding Mediator's Orientations, Strategies and Techniques: A Grid for the Perplexed' (1996) 1 *Harvard Negotiation Law Review* 7, 23-24. A similar approach is adopted in Chapter 7.

⁴² Maureen Laflin, 'Preserving the Integrity of Mediation through the Adoption of Ethical Rules for Lawyer-Mediators' (2000) *Notre Dame Journal of Law, Ethics & Public Policy* 479, 483.

⁴³ Ibid 484; Landerkin and Pirie, above n 3, 256, state that mediation 'processes take many procedural forms. There is no singularly right method or way to do mediation. Even in cases of the same subject-matter, there can be caucuses or only face-to-face meetings, specific directions on how to speak or more open conversations, emotions capped or explored, time restraints or all day sessions. Mediation can be short or long, 12 steps or six stages, many parties present or conducted online, Internet based or highly charged, held inside or outside a courthouse'. See also Sourdin, *Alternative Dispute Resolution*, above n 5, 26.

⁴⁴ Boule, above n 5, 221. See also Donald Weckstein 'In Praise of Party Empowerment – and of Mediator Activism' 33 (1997) *Williamette Law Review* 501, 526.

Carrie Menkel-Meadow identifies eight overlapping categories of mediation: purely facilitative, evaluative, transformative, bureaucratic, open or closed, activist or accountable, community and pragmatic.⁴⁵ According to Carrie Menkel-Meadow the formality of proceedings will vary greatly between models, from the extreme bureaucratic model ‘which occurs in courts or other institutional settings that can control and limit the process used’, to “‘on the spot” [pragmatic] mediation that is highly instrumentalist and agreement oriented’.⁴⁶ A similar approach has been adopted in the Australian literature. For example, Laurence Boulle delineates four models of mediation (settlement, facilitative, evaluative and therapeutic).⁴⁷ It is possible for a mediator to select certain elements of each model, or to commence mediation using one model and later ‘transform’ into another.⁴⁸ Whichever model is adopted, the extent to which the mediator actually participates in the mediation will vary according to ‘context, motivation and purpose’.⁴⁹ Thus, in any single meeting, mediators may assist parties by encouraging positional bargaining and persuading the parties to reach compromise (the ‘settlement’ model); encouraging dialogue and enhancing negotiation efforts (the ‘facilitative’ model); evaluating the parties’ positions and predicting outcomes (the ‘evaluative’ model); or by using ‘professional therapeutic techniques’ to ‘treat relationship issues’ (the ‘transformative’ model).⁵⁰

Different mediation techniques may be employed within these models, depending on the object of mediation and in accordance with the variable structural features agreed

⁴⁵ Menkel-Meadow, ‘The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices’, above n 6, 228-30.

⁴⁶ Menkel-Meadow. ‘The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices’, above n 6, 228-30.

⁴⁷ Boulle, above n 5, 43.

⁴⁸ Ibid.

⁴⁹ Ibid 10.

⁵⁰ Ibid 43-45. See also Sourdin, *Alternative Dispute Resolution*, above n 5, 26.

upon by the parties or imposed by the mediator.⁵¹ For example, it is common for facilitative mediators to reframe or summarise the positions expressed by parties so as to create room for negotiation or to reduce the impact of potentially inflammatory statements.⁵² It is also common for mediators to engage in ‘reality testing’ or ‘doubt creation’; that is to say, challenging ‘parties to face the legal, factual, financial and personal realities of their situations, [and] to reflect more systematically on and practically on a position, behaviour or attitude’.⁵³ A mediator’s use of reality testing and doubt creation may range from being purely facilitative in nature (in that they do not, and are not intended to, reveal the mediators thoughts or opinions) to being unambiguously evaluative in nature (in that they do, and are intended to, communicate the mediators thoughts or opinions).

Another technique commonly employed in mediation is the use of separate sessions (or ‘caucusing’).⁵⁴ Separate sessions are a core feature of the classic mediation

⁵¹ John Wade has identified eight ‘self-perceived’ practices adopted by experienced mediators: preparation and preparation meetings; whiteboards and visuals; reframing and summarizing; relacing and letting the process work; letting the clients speak more than the lawyers; where possible, sustaining the joint meeting; listening skills; and persistence and patience. John Wade, ‘What skills and attributes do experienced mediators possess?’ (1999) 5 *Australian Dispute Resolution Bulletin* 50.

⁵² Wade ‘What skills and attributes do experienced mediators possess?’, above n 51. This technique is also referred to as an aspect of ‘active listening’. See Sourdin, *Alternative Dispute Resolution*, above n 5, 44; Charlton and Dewdney, above n 38, 197-208.

⁵³ Boule, above n 5, 220. See also Sourdin, *Alternative Dispute Resolution*, above n 5, 68-69; Charlton and Dewdney, above n 38, 81; Astor and Chinkin, above n 5, 144; Spencer and Brogan, above n 5, 66-9.

⁵⁴ According to Tania Sourdin, the ‘private session is usually confidential and a practitioner will generally check confidentiality issues at the beginning and end of a private session’. Sourdin, *Alternative Dispute Resolution*, above n 5, 67. Charlton and Dewdney, above n 38, 93, identify 11 ‘useful purposes’ of private sessions’, including: ‘1. To ascertain what a party thinks of the mediation so far. 2. To expand on, raise new issues or complete unfinished business. 3. To allow parties to unwind and express their views in private. 4. To uncover the parties “bottom line”, that is, what their negotiation limits are. 5. To review the agenda, explore issues in more depth and explore new issues. 6. To reality test parties’ entrenched positions and identify underlying needs and interests. 7. To test opinions listed in joint session and to generate new ones and to respond to offers. 8. To act as an impasse breaker. 9. To foster a joint problem solving approach and re-affirm the parties’ ability to resolve their dispute. 10. To set the scene for final negotiations: exploring settlement options and rehearsing negotiations. 11. To proceed, as a last resort, with the mediation as a series of private sessions’.

model,⁵⁵ and ‘provide the mediator with a chance to speak with parties on their own and to allow a greater understanding of how the process might be profitably moved on’.⁵⁶ It is debatable whether or not separate meetings are an essential feature of mediation, a point considered in detail in Chapter 8. Mediators may also engage in private discussions with disputants (often in the form of telephone conversations) prior to the mediation conference, in order to clarify the issues to be discussed.⁵⁷

Mediation ‘Pressure Points’

The preceding analysis reveals a number of pressure points in the relationship between mediation and the judicial function. The first pressure point arises because of the manner in which mediators participate in the mediation process. Conflict may arise in a number of ways. Firstly, the use of mediation techniques such as reality testing or doubt creation, the provision of advice, the expression of opinions, or the holding of separate meetings or private communications, may undermine the rule against bias.⁵⁸ The detailed relationship between the rule against bias and Ch III is examined in Chapter 4. At this stage, it is sufficient to note that a judge may be disqualified as a result of actual or apprehended bias,⁵⁹ and that general adherence to this principle is an implicit requirement of Ch III.⁶⁰ Secondly, it has been suggested that judicial participation in the mediation process (and in particular the use of

⁵⁵ Boulle, above n 5, 189 – 193.

⁵⁶ Spencer and Brogan, above n 5, 66.

⁵⁷ Boulle, above n 5, 178-179; Astor and Chinkin, above n 5, 140; Charlton and Dewdney, above n 38, 3-8.

⁵⁸ Tucker, above n 2, 86.

⁵⁹ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344 – 345 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁶⁰ *Ibid* 362 [79] (Gaudron J).

separate meetings) will undermine the ‘integrity’ of the judiciary.⁶¹ The High Court’s approach to this concept is examined in Chapters 4, 5 and 6.

The second pressure point arises by virtue of the inherent privacy of the mediation process. Firstly, if judges hold mediation conferences in private (to the exclusion of the general public), judicial mediation may undermine the principles of open justice, which is also an implied requirement of Ch III.⁶² Secondly, judicial mediation may limit the effectiveness of appellate review, as it may be ‘effectively impossible for ... appellants to adduce sufficient evidence to sustain their case’.⁶³ It is also uncertain whether judge-mediators could be called upon by appellate courts to provide oral testimony as to the discussions held in mediations, or whether this information would be somehow protected.⁶⁴ Were judges to provide evidence in such circumstances, this could further expose judges to allegations of improper conduct or bias, and may also undermine the integrity of the judiciary.⁶⁵ The third way in which the privacy of the mediation process could conflict with the judicial function is by undermining the normative/law-making role the judiciary. The objectives of judicial mediation are opposed to the principle of *stare decisis* because, by transferring decision-making

⁶¹ Sir Laurence Street, ‘Mediation and the Judicial Institution’, above n 2, 796; Tucker, above n 2, 94.

⁶² Leslie Zines, *The High Court and the Constitution* (5th ed 2008), 274-5; Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’ (1997) 23(2) *Monash University Law Review* 248, 261-2; Chief Justice James Spigelman, ‘Seen to be Done: the Principle of Open Justice – Part II’ (2000) 74 *Australian Law Journal* 378. Following *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, open justice is unlikely to be an implied requirement in State courts. This case is discussed in detail in Chapter 6.

⁶³ Tucker, above n 2, 90. Similar concerns have been raised in relation to the expansion of prehearing processes in general. See, for example, Judith Resnik, ‘Managerial Judges’ (1982-83) 96 *Harvard Law Review* 374, and Stephen Yeazell, who suggests that ‘operating on processes that produce numerous rulings that do not result in judgment...will decrease appellate control’. ‘The Misunderstood Consequences of Modern Civil Process’ (1994) *Wisconsin Law Review* 631, 661.

⁶⁴ Whether a judge mediator may be called as a witness will depend, inter alia, on the terms of the mediation agreement and any relevant statutory rules. See Boulle, above n 5, pp 359, 371, 450, 491, 550. Gleeson CJ has stated that as a matter of policy mediators should not generally be called as witnesses. *Gain v Commonwealth Bank of Australia* (1997) NSWLR 252, 256. But see *Glenn v Delalite CC* [2000] VCAT 505.

⁶⁵ Tucker, above n 2, 91.

power to disputants, a 'successful' judicial mediation programme will reduce the frequency of judicial decisions, ergo the body of judicial precedent.⁶⁶

The final pressure point in the relationship between mediation and the judicial function arises because of the confidentiality of the mediation process. First of all, as mediation 'does not oblige parties to reveal information that might be imparted unavoidably in a court trial ... [or] necessarily require that the parties make equal efforts to reveal relevant information relating to their case,'⁶⁷ it is possible (assuming no settlement is reached) that by participating in mediation a judge will be privy to information that he/she would not otherwise have been privy to during the trial process. Alternatively, if the judge-mediator does not go on to adjudicate if mediation fails, he or she could directly or indirectly disclose confidential information to the adjudicating judge. If a judge were aware of information revealed in confidence during the mediation this could prejudice the perception of that judge's ability to bring an impartial mind to the resolution of the dispute.⁶⁸

The provision of information in confidence could also undermine a party's right to a fair trial. This is because allegations or insinuations may be made during mediation which, although inadmissible as evidence, may nevertheless influence the judge's decision if the matter proceeds to trial. If the evidence is not formally admitted, the

⁶⁶ Again, however, judicial mediation is no different in this regard to other prehearing processes. Stephen Yeazell has argued that if 'one remembers that courts are instruments of government, it is not too much to call [the expansion of prehearing processes] both a change in the location of government power and the passage to private hands of some of what was once governmental power'. Above n 63, 631.

⁶⁷ Tucker, above n 2, 85-86.

⁶⁸ *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Australian National Industries v Spedley Securities* (1992) 26 NSWLR 411; *Webb v The Queen* (1994) 181 CLR 41, 74; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

affected party would be unable to challenge its probity; contrary to accepted rules of evidence⁶⁹ and the requirements of Ch III.⁷⁰

What is Judicial Mediation intended to Achieve?

What, then, is judicial mediation intended to achieve? Superficially, the aim of judicial mediation may appear immaterial to the question whether Ch III prohibits judicial mediation. As will be seen, however, whether judicial mediation accords with the requirements of Ch III will turn, in part, upon whether judicial mediation serves the rule of law.⁷¹ Put differently, if the purpose and/or effect of judicial mediation is consistent with rule of law values, then it is less likely to conflict with the implications drawn from Ch III. This proposition is developed throughout the following Chapters. The current section demonstrates that the objectives of judicial mediation can be traced to the access to justice movement, and that judicial mediation may be classified as a reform within the ‘third-wave’ of that movement. As such, and although it may also improve the quality of individual justice, it is suggested that the primary object of judicial mediation is to increase the efficiency of (and access to) the civil trial process.

Chief Justice Gleeson has commented that:

It may be fortunate that the manifest imperfections of our system, and of all other systems, give us so many practical problems to try to fix that we are spared the embarrassment of having to identify the goal towards which we

⁶⁹ *Browne v Dunn* (1893) 6 R 67 (HL).

⁷⁰ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334.

⁷¹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

are presumably stumbling. So long as what we are seeking to achieve are relatively modest and measurable, improvements to a necessarily imperfect system, we can maintain our sense of purpose. However, occasionally someone must ask what is the ultimate objective.⁷²

Presumably, the ultimate objective of civil justice reform is the attainment of an ideal civil justice system. The difficulty is that an ideal civil justice system is almost certainly unattainable; not only because there is no agreement as to the essential attributes of such a system, but because the perceived ‘practical problems’ to which Chief Justice Gleeson refers may be necessary evils of that system.⁷³ How accessible, cheap, efficient, and socially revered should a civil justice system actually be?⁷⁴ While a single ‘utopian’ objective may be elusive, various smaller objectives of civil justice reform can be isolated from existing scholarship and research and can provide reference points.

Civil justice reform cannot be viewed as a purely 20th century phenomenon. Nevertheless, the most significant changes to the Australian civil justice system have taken place from the 1970’s onward, and can be assayed within the theories and ideologies espoused by the ‘access to justice’ movement.⁷⁵ It is difficult to pinpoint the precise origins of the access to justice movement,⁷⁶ but two pivotal events in its early days were the National Conference on the Causes of Popular Dissatisfaction

⁷² Chief Justice Murray Gleeson, ‘Managing Justice in the Australian context’ (2000) 77 *Reform* 62, 63.

⁷³ Richard Ingleby, ‘Court Sponsored Mediation: The Case Against Mandatory Participation’ (1993) 56 *Modern Law Review* 441, 442.

⁷⁴ *Ibid.*

⁷⁵ Nadja Alexander, ‘Global Trends in Mediation: Riding the Third Wave’ in Nadja Alexander (ed), *Global Trends in Mediation* (2006) 1-5; Astor and Chinkin, above n 5, 3-6.

⁷⁶ Carrie Menkel-Meadow, ‘The Intellectual Founders of ADR’ (2000) 16 *Ohio State Journal of Dispute Resolution* 1, 2.

with the Administration of Justice (the ‘Pound Conference’) in 1976,⁷⁷ and the Florence Access to Justice Project (the ‘Florence Project’), which took place throughout the 1970’s.⁷⁸ At the heart of both of these forums, (as the name of the former suggests)⁷⁹ was a concern that individuals were becoming increasingly disenfranchised from the justice system. In Australia, the access to justice movement can be traced more specifically to the work of the Law and Poverty section of the Australian Commission of Inquiry into Poverty (the ‘Australian Poverty Commission’), established by the Whitlam government in 1972. The Australian Poverty Commission produced a series of reports in 1975,⁸⁰ culminating in a final report entitled ‘Law and Poverty in Australia’ in the same year.⁸¹

Ironically, delegates at the Pound Conference did not attempt to identify the ‘causes of popular dissatisfaction with the administration of justice’.⁸² According to J. Clifford Wallace, ‘there was no information presented, from which one might assess popular dissatisfaction, a necessary precondition to identification of its causes’.⁸³ However, in a seminal article based on the findings of the Florence project Mauro

⁷⁷ Leo Levin and Russel Wheeler (eds), *The Pound Conference: Perspectives of Justice in the Future* (1979).

⁷⁸ Mauro Cappelletti (ed), *The Florence Access to Justice Project, Volumes I – IV* (1978).

⁷⁹ The Pound conference takes its name from a 1901 speech by Roscoe Pound: Roscoe Pound, ‘The Causes of Dissatisfaction with the Administration of Justice’ (1906) *Republican American Bar Association* 395.

⁸⁰ See, in particular, Australian Commission of Inquiry into Poverty (Michael Cass and Ronald Sackville), *Legal Needs of the Poor*, (1975); Australian Commission of Inquiry into Poverty (Ronald Sackville), *Legal Aid in Australia*, (1975); Australian Commission of Inquiry into Poverty (Ronald Sackville), *Homeless People and the Law*, (1975); Australian Commission of Inquiry into Poverty (Adrian Jakobowicz and Berenice Buckley), *Migrants and the Legal System*, (1975); Australian Commission of Inquiry into Poverty (Adrian Bradbrook), *Poverty and the Residential Landlord-Tenant Relationship*, (1975).

⁸¹ Australian Commission of Inquiry into Poverty, *Second Main Report: Law and Poverty in Australia*, (1975).

⁸² In fact, as J. Clifford Wallace recognises, Roscoe Pound did not attempt to identify the causes of dissatisfaction either. ‘Judicial Reform and Pound Conference of 1976’ (1982) 80 (4) *Michigan Law Review* 592, 593.

⁸³ *Ibid.*

Cappelletti and Bryant Garth identified three broad ‘barriers’ to effective access to justice:

1. ‘Costs of litigation’ (in terms of high legal fees, the futility of pursuing many small claims, and the time involved in litigation).⁸⁴
2. ‘Relative party compatibility’ (in terms of financial resources, legal competence and comparative litigation experience).⁸⁵
3. ‘The special problems of diffuse interests’ (in situations whereby individual rights can only be protected collectively, or the infringement of an individual right is too small to induce enforcement).⁸⁶

The removal of financial barriers to access was a primary object of the Law and Poverty section of the Australian Poverty Commission, and (as demonstrated below) concerns as to the ‘cost’ of litigation remain a primary driver of civil justice reform in Australia.⁸⁷

Cappelletti and Garth observed that legal scholarship in the first half of the 20th century was predominantly confined to the development of formal rights for individuals, and was

⁸⁴ Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the World-Wide Movement to Make Rights Effective’ (1978) 27 *Buffalo Law Review* 183, 186-190.

⁸⁵ *Ibid* 190-193.

⁸⁶ Cappelletti and Garth, above n 84, 194-195.

⁸⁷ Australian Commission of Inquiry into Poverty, above n 81, 1. See, for example, the recent report by the Commonwealth Attorney General Department’s Access to Justice Task Force, *A Strategic Framework for Access to Justice in the Civil Justice System*, (September 2009), 8, which proposes a ‘strategic framework’ for access to justice based on a model of ‘supply and demand’.

typically formalistic, dogmatic, and aloof from the real problems of civil justice. Its concern was frequently one of mere exegesis or abstract system building; even when it went beyond this concern, its method was to judge the rules of procedure on the basis of historical validity and their operation in hypothetical situations.⁸⁸

The authors went on to classify the access to justice movement by reference to three overlapping ‘waves’⁸⁹ which reflect a shift from the ‘individualistic, laissez-faire view of [formal] rights reflected in eighteenth and nineteenth century bills of rights, towards the social rights and duties of governments, communities, associations and individuals’.⁹⁰ An important incident of these new rights and duties was an assumption of ‘affirmative commitment by the State’⁹¹ to ensure that they were in fact accessible. Access to justice, in other words, meant *effective* access to justice.⁹² From an Australian perspective, the Australian Poverty Commission similarly explained that:

The Australian legal system ... is based on the British common law which has long accepted as an article of faith the principle that justice must be

⁸⁸ Cappelletti and Garth, above n 84. As discussed at length in Chapter 5, the tendency to ‘judge rules of procedure on the basis of historical validity’ is still prevalent in Australian constitutional jurisprudence, and in this way the High Court has constructed a barrier between the judicial function and the influence of the access to justice movement (and in particular the third-wave of that movement).

⁸⁹ Cappelletti and Garth, above n 84, 181. These ‘waves’ are described here as ‘overlapping’ because, as Justice Sackville has pointed out, the metaphor may otherwise give rise to the ‘misleading impression of a series of discrete changes to legal systems occurring at different periods in the development of legal systems. It is more accurate to think of the “waves” as a number of interrelated changes. Some may be continuing in one form or another, while others may be in retreat’. Justice Ronald Sackville, ‘Some Thoughts on Access to Justice’ (Paper presented to the First Annual Conference on the Primary Functions of Government, New Zealand, 28 – 29 November 2003), 5.

⁹⁰ Cappelletti and Garth, above n 84, 184. See also, and generally, Mauro Cappelletti (ed), *Access to Justice and the Welfare State* (1979).

⁹¹ Richard Claude, ‘The Classical Model of Human Rights Development’, in Richard Claude (ed) *Comparative Human Rights* (1976) 6, 32.

⁹² Cappelletti and Garth, above n 84, 185.

administered impartially and without regard to a person's means of social position. It is universally agreed that everyone, no matter how humble, should be entitled to his 'day in court'. Lawyers and laymen alike consider it unthinkable that the legal system should discriminate against a person simply because he is poor. Yet even on these uncontentious criteria the law has failed to accord equal treatment ... [S]ome people, simply because they are too poor, too ignorant or too frightened, do not have access to the courts nor do they obtain the legal assistance they need to enforce their basic rights and to protect themselves against grievous injustice.⁹³

First wave reforms seek to achieve effective access by removing economic barriers through the introduction of programs such as legal aid and 'judicare'.⁹⁴ The second wave responds to 'the problem of representing group and collective – diffuse – interests other than those of the poor'⁹⁵ through (amongst other things) the introduction of ombuds systems⁹⁶ and the recognition of class action suits (or 'representative proceedings').⁹⁷ The third wave represents attempts to 'attack barriers in a more articulate and comprehensive manner'⁹⁸ and includes the development of ADR processes and the introduction of case-management.⁹⁹ There is also evidence to

⁹³ Australian Commission of Inquiry into Poverty, above n 81, 1.

⁹⁴ Cappelletti and Garth, above n 84, 197-209. In Australia, legal aid as we recognise it today was first introduced by the *Commonwealth Legal Aid Commission Act 1977*. In fact, though, a limited form of legal aid has been available to Australian servicemen since the beginning of the Second World War. The Law Institute of Victoria provided legal aid to servicemen from 1940 onward, and other States quickly followed suit. The Commonwealth Legal Services Bureau was established in 1942. See generally: Don Fleming and Frances Regan, "'Evatt's Bastard Child': The Commonwealth Legal Service Bureaux 1942 – 51" (2003) *Australian Journal of Legal History* 15.

⁹⁵ Cappelletti and Garth, above n 84, 209.

⁹⁶ Ibid 213.

⁹⁷ Ibid 217. Most Australian jurisdictions have operated ombudsmen systems since the mid 1970's (see *Ombudsman Act* (Cth) 1976; *Ombudsman Act* 1972 (SA); *Ombudsman Act* 1973 (Vic); *Ombudsman Act* 1974 (NSW); *Ombudsman Act* 1989 (ACT)). In Queensland the *Parliamentary Commissioner Act 1974* (Qld) created an office comparable to that of an ombudsman. This Act has since been repealed by the *Ombudsman Act* 2001 (Qld). Western Australia does not have an ombudsman system.

⁹⁸ Cappelletti and Garth, above n 84, 197. Nadja Alexander has described this process as 'riding the third wave'; Nadja Alexander, above n 75, 1-35.

⁹⁹ These concepts are examined in more detail in Chapter 7.

suggest that ADR processes such as mediation now resolve a significant proportion (perhaps even the bulk) of civil disputes. This evidence is analysed in more detail later in this Chapter.¹⁰⁰

Cappelletti and Garth's 'wave' model provides a paradigm for examining the relationship between third-wave reforms such as judicial mediation, on the one hand, and concepts such as procedural fairness (which originated before the advent of the access to justice movement) on the other. This paradigm is useful because many of the issues raised by judicial mediation reflect broader practical and jurisprudential questions common to other third-wave reforms, including managerial judging or case management, and the implementation of so-called less adversarial trials ('LATS').¹⁰¹ Comparisons with these processes can provide valuable insights into how judicial mediation is likely to operate in practice, and the manner in which its expansion might be controlled. These processes are considered in detail in Chapter 7.

Is there still a need to improve access?

Overall, civil justice reforms implemented over the past 40 years (such as legal aid, the introduction of ombuds systems and the growth of case-management) appear to have had a positive impact on access to justice in Australia.¹⁰² It might reasonably be

¹⁰⁰ See below nn 184-212 and accompanying text.

¹⁰¹ There was initially some debate as to whether the 'wave' metaphor is applicable outside the United States, and in civil law countries such as Germany in particular. According to Cappelletti and Garth, however, while 'admittedly, a simple chronology based on the United States could be misleading, and while we should not expect precisely the same developments in all welfare states, we believe that the analysis underlying the wave metaphor is nevertheless valid'. Mauro Cappelletti and Bryant Garth, 'Introduction', in Mauro Cappelletti (ed), *Access to Justice and the Welfare State* (1981), 5.

¹⁰² As regards legal aid, for example, Justice Ronald Sackville has pointed out that for 'those who have not experienced life without a national legal aid system, however flawed the system might be, it is perhaps easy to forget that until the establishment of the Australian Legal Aid Office by the Whitlam Government, there was no publicly funded legal aid scheme of general application in Australia providing legal representation in civil matters. The very first step in enhancing access to justice was to

wondered, therefore, whether or to what extent the barriers identified by the access to justice movement still exist.

The answer to this question is obfuscated by disagreement as to how the success of civil justice systems should be measured, and the relationship between the various measures adopted. Can a system be evaluated on the basis of cost alone? If so, can cost be distinguished from other quantitative issues such as time and delay, and qualitative issues such as disputant satisfaction, outcome durability and the psychological impact of litigation? Should the public costs associated with maintaining the justice system also be considered?¹⁰³ The following part of this Chapter examines the relationship between the various measures commonly adopted to determine ‘success’ in civil justice, and concludes that although cost cannot be the sole measure of success, litigant expenditure can nevertheless be reduced without overburdening the courts or undermining the quality of civil justice.

Is there a ‘crisis’ in civil justice?

By the early 1990’s common law legal systems (and to a lesser extent civil law systems)¹⁰⁴ had come to be viewed as ‘costly, inaccessible, and beset by delays’.¹⁰⁵

fill that yawning gap’. Justice Ronald Sackville, ‘Access to Justice: Assumptions and Reality Checks’ (Paper presented to the Law and Justice Foundation of New South Wales Access to Justice Workshop, Sydney, 10 July 2002), 2.

¹⁰³ According to the ALRC: ‘The public cost of financing federal courts, federal review tribunals, the Australian Industrial Relations Commission (AIRC) and the National Native Title Tribunal (NNTT), and related dispute resolution arrangements in federal commissions and ombudsmen, was approximately \$350 million in 1997-98’. Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, ALRC Report No 89 (2000) [4.6].

¹⁰⁴ Adrian Zuckerman, ‘Civil Justice in Crisis: Comparative Dimensions of Civil Procedure’, in Sergio Chiarloni, Peter Gottwald, Adrian Zuckerman (ed) *Civil justice in crisis: Comparative perspectives of civil procedure* (1999) 3-52.

¹⁰⁵ Sir Anthony Mason, ‘The Australian Judiciary in the 1990’s’ (Address to the Sydney Institute, Sydney, 15 March 1994), 1-2. Concerns of excessive cost, delay and complexity also underpinned the Woolf reforms in England and Wales. See Lord Harry Woolf, *Access to Justice: Interim Report* (1995),

This perception led to claims of a ‘crisis’ in civil justice.¹⁰⁶ Notable supporters of the crisis theory in Australia included Sir Anthony Mason¹⁰⁷ and the Commonwealth Attorney General Michael Lavarch.¹⁰⁸ In 1994, Attorney-General Michael Lavarch established the Access to Justice Advisory Committee (‘AJAC’), which stated that:

We think that the time has come for a concerted action to make justice more accessible to all Australians ... Unless a systematic and sustained effort is made to achieve [this] ... public faith in the institutions of the justice system is likely to remain low.¹⁰⁹

In 1996, Chief Justice Brennan added further credence to the crisis theory, noting extra-curially that:

The courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally-aided litigant; governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an overstatement to say that the system of administering justice is in crisis.¹¹⁰

7. See also Nadja Alexander, ‘From common law to civil law jurisdictions: court ADR on the move in Germany’ (2001) 4(8) *The ADR Bulletin* 110, 112-113, who describes a perception of the litigation process in common law countries as ‘impossibly expensive, long and drawn out’.

¹⁰⁶ See, for example, Justice David Ipp, ‘Reforms to the Adversarial Process in Civil Litigation’ (Pt 1) (1995) 69 *Australian Law Journal* 705, 705; Justice David Ipp, ‘Reforms to the Adversarial Process in Civil Litigation’ (Pt 2) (1995) 69 *Australian Law Journal* 790; Justice Geoffrey Davies, ‘Civil Justice Reform in Australia’ in Sergio Chiarloni, Peter Gottlwald, Adrian Zuckerman (ed) *Civil justice in crisis: Comparative perspectives of civil procedure* (1999) 166; Paul Michalik, ‘Justice Crisis in England and Wales’ in Sergio Chiarloni, Peter Gottlwald, Adrian Zuckerman (ed), *Civil justice in crisis: Comparative perspectives of civil procedure* (1999), above n 104, 117.

¹⁰⁷ Mason, above n 105.

¹⁰⁸ Access to Justice Advisory Committee, *Access to Justice – An Action Plan* (1994) xxix.

¹⁰⁹ *Ibid* 4.

¹¹⁰ Sir Gerard Brennan, ‘Key issues in judicial administration’ (Revised Version of a paper presented by Sir Gerard Brennan and Sir Thomas Eichelbaum at the Fifteenth Annual Conference Australian Institute of Judicial Administration, Wellington, 20-22 September 1996).

The litigation ‘crisis’ encompasses (at least) two discrete concerns. The first concern is that the financial costs of litigation are excessive – both in terms of court fees, which may exceed ‘what is reasonable necessary to inhibit the launching of unnecessary proceedings’, and legal professional costs,¹¹¹ including ‘counsel fees, expert fees, discovery and documents’.¹¹² The second concern is that the civil justice system lacks the capacity to efficiently dispose of an increasing number of cases being brought before it (the ‘litigation explosion’), resulting in excessive trial times and delays.¹¹³ The solutions to these concerns may conflict because, if the cost of litigation is too low, the number of cases filed is likely to increase, as will the burden on the courts (and vice versa).¹¹⁴ This possibility is examined below.

Whether concerns of excessive financial cost in litigation are (or ever were) justified is a moot point. This is partly because there is no universally agreed formula by which to determine what a reasonable level of cost is.¹¹⁵ For example, should the ‘reasonableness’ of costs be determined by comparing the overall value of a claim with the amount expended on legal fees? If not, is there an ideal amount, or range

¹¹¹ Ibid. In England and Wales, legal professional costs were identified by the Department for Constitutional Affairs as an area of growing concern; the Department noting that solicitor’s fees had increased in excess of the rate of inflation. United Kingdom Department of Constitutional Affairs (UK), *Further Findings: A Continuing Evaluation of Civil Justice Reforms*, (2002), [7.7]-[7.8]. <<http://www.dca.gov.uk/civil/reform/ffreform.htm#part7>> at 12 October 2009.

¹¹² Lord Harry Woolf, *Access to Justice: Final Report* (1996), Schedule III ‘Survey of Litigation Costs (Professor Hazel Grant)’, [2].

¹¹³ Marc Galanter, ‘Beyond the Litigation Panic’ (1988) 37 (1) *Proceedings of the Academy of Political Science*, 18. At the time of writing the Commonwealth Attorney-General Department’s Access to Justice Task Force has also just released a report stating that the ‘the economic downturn is likely to mean that more people will be making some contact with the justice system, or an agency that provides information or services relating to legal issues for help’. *A Strategic Framework for Access to Justice in the Civil Justice System*, (September 2009) 12.

¹¹⁴ In Brennan CJ’s opinion, this dichotomy highlights ‘the necessity for court procedures to be simple and for methods of dispute resolution that reduce the costs that would otherwise be incurred by going to trial’. Sir Gerard Brennan, above n 110.

¹¹⁵ The ALRC notes that ‘these are not easy questions to answer for the disparate case types in federal civil jurisdiction’. See generally, Tim Fry, ‘Costs of Litigation in the Family Court of Australia and in the Federal Court of Australia’ (Report to the ALRC, November 1999).

within which litigant expenditure should fall, and should this amount/range be linked to case type and/or jurisdiction?

Despite continuing disagreement on this issue, it is apparent that concern as to the cost of litigation has been a primary catalyst for law reform in Australia and overseas.¹¹⁶ While care must be taken to avoid careless comparisons with foreign statistics and commentary (not least because of Australia's unique system of federal government),¹¹⁷ Australian civil justice reform in the 1990's drew heavily upon the work of Lord Woolf's review of access to justice in England and Wales. It is useful, on this basis, to consider whether concerns of a crisis were ever warranted in that jurisdiction, and the measure of costs upon which Lord Woolf based his findings.

In his Interim Report, Lord Woolf cautioned that excessive 'cost deters people from making or defending claims ... For individual litigants the unaffordable cost of litigation constitutes a denial of access to justice'.¹¹⁸ In response, Michael Zander argued that there was insufficient evidence to support this contention, and described Lord Woolf's references to cost, delay and complexity as 'clichés'.¹¹⁹ In his Final Report Lord Woolf countered that, while there was little evidence of increasing costs in the majority of case types (with the exception of medical negligence), the 'proportionate' costs of litigation were, nevertheless, excessive.¹²⁰ On the basis of a review undertaken by the Supreme Court Taxing Office, His Lordship reported that

¹¹⁶ Sourdin, 'Judicial Management and Alternative Dispute Resolution Process Trends', above n 2, 189.

¹¹⁷ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 120 [189] (Kirby J).

¹¹⁸ Lord Harry Woolf, *Access to Justice: Interim Report* (1995), Ch 3, [13].

¹¹⁹ Michael Zander, 'Why Lord Woolf's Reforms of Civil Litigation Should Be Rejected' in Adrian Zuckerman and Ross Cranston (eds) *Reform of Civil Procedure: Essays on Access to Justice* (1995), 81.

¹²⁰ Woolf, above n 112, Section I [10]-[11].

average costs among the lowest value claims consistently represent more than 100 per cent of claim value and in cases between £12,500 and £25,000 average costs range from 40 per cent to 95 per cent of claim value. To put it another way, the present system provides higher benefits to lawyers than to their clients. It is only when the claim value is over £50,000 that the average combined costs of the parties are likely to represent less than the claim.¹²¹

The Woolf Inquiry in England and Wales preceded an inquiry into the Australian federal justice system by the Australian Law Reform Commission ('ALRC'). In the course of its inquiry, the ALRC released six background papers,¹²² five issue papers,¹²³ and one discussion paper,¹²⁴ culminating in a final report entitled 'Managing Justice: A Review of the Federal Civil Justice System' in 2000 ('Managing Justice').¹²⁵ In its final report, the ALRC rejected Lord Woolf's proportionate costs model, on the basis that it assumes a correlation between the cost of litigation and claim value which is inappropriate in certain cases:

¹²¹ Woolf, above n 112, Section II, Ch 1, [11].

¹²² Australian Law Reform Commission, *Federal jurisdiction*, ALRC BP 1 (1996); Australian Law Reform Commission, *Alternative or assisted dispute resolution*, ALRC BP 2 (1996); Australian Law Reform Commission, *Judicial and case management*, ALRC BP 3 (1996); Australian Law Reform Commission, *The unrepresented party*, ALRC BP 4 (1996); Australian Law Reform Commission, *Civil litigation practice and procedure*, ALRC BP 5 (1996); Australian Law Reform Commission, *Experts*, ALRC BP 6 (1999); Australian Law Reform Commission, *Review of the federal civil justice system*, ALRC DP 62 (1999).

¹²³ Australian Law Reform Commission, *Review of the adversarial system of litigation: Rethinking the federal litigation system*, ALRC IP 20 (1997); Australian Law Reform Commission, *Review of the adversarial system of litigation: Rethinking family law proceedings*, ALRC IP 22 (1997); Australian Law Reform Commission, *Technology -- what it means for federal dispute resolution*, ALRC IP 23 (1998); Australian Law Reform Commission, *Review of the adversarial system of litigation: Federal tribunal proceedings*, ALRC IP 24 (1998); Australian Law Reform Commission, *Review of the adversarial system of litigation: ADR -- its role in federal dispute resolution*, ALRC IP 25 (1998); Australian Law Reform Commission, *Review of the federal civil justice system*, ALRC DP 62 (1999).

¹²⁴ Australian Law Reform Commission, *Review of the federal civil justice system*, ALRC DP 62 (1999).

¹²⁵ Australian Law Reform Commission, above n 103.

An evaluation of the proportionality of costs and the legal claim is difficult to test in federal jurisdiction. A significant proportion of the litigation in the Federal Court and Family Court and federal review tribunals does not concern quantifiable money claims. A case may have no amount in dispute or a notional or unquantified amount, for example, a trademark, allegations of misleading and deceptive conduct, an administrative decision concerning a visa or benefit, or a family dispute concerning finances with related questions about parental contact with, or residence of, children.¹²⁶

The ALRC did, nevertheless, measure the proportionate cost of litigation in the Family Court against family property, and found that 90% of litigants spent less than 12% of the value of the disputed property on legal costs.¹²⁷ This proportion is ostensibly lower than that reported by Lord Woolf in England and Wales, although the unique nature of the federal family jurisdiction and the (presumably) high value of family property make direct comparisons difficult. The Victorian Law Reform Commission also acknowledged that proportionate costs can be misleading or inappropriate,¹²⁸ but reported, nevertheless, that proportionate costs were ‘relatively high’ in a number of Victorian Supreme Court cases.¹²⁹

How, then, should ‘cost’ be measured, and how has it been measured in Australia? In its final report on Managing Justice, the ALRC focussed on the median costs of litigation and the range within which costs fell. In its Final Report in 2000, the ALRC reported that the median cost of litigation in the Federal Court was \$15820 for

¹²⁶ Ibid [4.53].

¹²⁷ Australian Law Reform Commission, above n 103, [4.54].

¹²⁸ Victorian Law Reform Commission, *Civil Justice Reform: Report*, Report No 98 (2008), [656]-[658]. The Law Reform Commission of Western Australia neither accepted nor rejected this approach: Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) Ch 16.

¹²⁹ Victorian Law Reform Commission, above n 128, 650.

applicants and \$8463 for respondents, and ranged from \$350 to over \$1 million for applicants and \$55 to over \$1.1 million for respondents.¹³⁰ In the Family Court the median cost of litigation was \$2209 for applicants and \$2090 for respondents, and ranged between \$40 and \$126,361 for applicants and \$8 to \$160,532 for respondents.¹³¹ Costs also varied considerably between case type.¹³²

The ALRC considered the median costs of litigation to be ‘reasonable’.¹³³ However, the benchmark against which this ‘reasonableness’ was measured was not specified. Indeed, the ALRC acknowledged that questions ‘remain concerning how one determines generally, or in a particular case, whether the legal costs incurred were reasonable or excessive’.¹³⁴ The figures presented by the ALRC are now almost a decade old, and a recent report by the Commonwealth Attorney General’s Access to Justice Task Force has cited ‘clear’ evidence to the effect that ‘legal costs have risen since the ALRC study was undertaken’.¹³⁵ Research conducted in Victoria suggests that the costs of litigation may also be higher at the State level than the earlier figures quoted by the ALRC. According to Tania Sourdin, the median cost of litigation in the Supreme and County Courts of Victoria is currently \$35,000 (\$86,108 mean), and ranges between \$500 and \$849,000.¹³⁶ As might be expected, the median cost for disputants in the Supreme Court was higher than the median cost for disputants in the

¹³⁰ Australian Law Reform Commission, above n 103, [4.12 – 4.13]

¹³¹ Ibid.

¹³² Ibid [4.14].

¹³³ Australian Law Reform Commission, above n 103, [4.12]-[4.13]. Mean costs were not reported, presumably on the basis that the extreme costs of a small number of cases skewed the data.

¹³⁴ Australian Law Reform Commission, above n 103, [4.2].

¹³⁵ Commonwealth Attorney General’s Access to Justice Task Force, 41; citing Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System*, (2004) 28.

¹³⁶ Tania Sourdin, *Mediation in the Supreme and County Courts of Victoria* (2009) 98.

County Court (\$37,500 and \$32,500 respectively).¹³⁷ These figures support the earlier conclusion of the VLRC that

the conduct of civil litigation in the higher courts remains excessively expensive and beyond the financial capacity of many people. This problem has been compounded by the curtailment of civil legal aid schemes by both the state and federal governments in recent years.¹³⁸

The VLRC did not state what it believed the ‘cost’ of litigation to be, nor did it provide the measure against which this assessment was made. Assuming that the estimated costs were similar to those reported by Tania Sourdin, however, this assessment seems reasonable – especially in light of the ALRC’s findings, which suggest that federal courts are less expensive.

In any event, and whatever an ‘appropriate’ cost for litigation may be, it is self-evident that access to justice will be improved if litigation costs are reduced. This is provided, however, that a reduction in costs does not fuel a ‘litigation explosion’ with negative consequences for the efficiency or quality of civil justice. In fact, with the exception of personal injury litigation (the rapid expansion of which has been countered by specific legislative action in the States and territories),¹³⁹ there is very little evidence to support fears of a litigation explosion. In an early American commentary on the issue, Marc Galanter concluded that:

¹³⁷ Ibid.

¹³⁸ Victorian Law Reform Commission, above n 128, [77].

¹³⁹ *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA); *Civil Liability Act 2002* (Tas); *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic); *Civil Liability Act 2002* (WA); *Personal Injuries Proceedings Act 2002* (Qld); *Civil Liability Act 2003* (Qld).

Respect for the available evidence suggests a more benign reading of the current situation than inhabits discussions of the lawsuit crisis or litigation explosion. The United States is not faced with an inexorable exponential explosion of cases but with a series of local changes, some sudden but most incremental, as particular kinds of troubles move in and out of the ambit of the courts.¹⁴⁰

Marc Galanter's conclusion reflects the findings of the various law reform inquiries undertaken in Australia. In the federal context, the ALRC reported that:

[T]he Commission's investigation does not support the crisis theory – at least not in relation to the federal courts and tribunals. For example, the Commission found a rise in case loads in some areas of federal jurisdiction, but no 'litigation explosion'; small numbers of cases taking two to three years to finality, evident room for improvement in case duration, but no systemic, intractable delay in case processing or resolution.¹⁴¹

The same would appear to be true at the State level. According to the VLRC, the volume of civil litigation in Victoria has increased in proportion with the expansion of the economy.¹⁴² In Queensland, on the other hand, there may even have been a reduction in case volume for certain case types. In 2002, it was reported that the Queensland Supreme Court had developed a new fast-track system for certain

¹⁴⁰ Galanter, 'Beyond the Litigation Panic', above n 113, 29. See also Marc Galanter, 'What We Know and Don't Know (And Think We Know) about our Allegedly Contentious Society' (1983) 31 *UCLA Law Review* 4; Marc Galanter, 'The Day After the Litigation Explosion' (1986) 46 *Maryland Law Review* 3; Marc Galanter, 'Real World Torts' (1996) 55 *Maryland Law Review* 1093, 1155.

¹⁴¹ Australian Law Reform Commission, above n 103 [1.48]. See also Law Reform Commission of Western Australia, above n 128, 5 [1.10].

¹⁴² Victorian Law Reform, above n 128, 66-67.

commercial cases in order to ‘compete for more business’.¹⁴³ In more general terms, Justice Hayne has also observed that:

I do not know whether similar statistics have been gathered in Australia [as in the US]. But I have the clear impression that over the last 15 or 20 years, perhaps longer, the number of civil cases tried to judgment in Australia’s State and territory Courts, and in the Federal Court of Australia, either has diminished, or at least has not kept up with the number of judicial officers in those courts or the increase in the size of the population. My impression is that this is so no matter whether the comparison is made between raw numbers or only between the proportions of cases that are tried to judgment.¹⁴⁴

Even it is assumed (for the sake of argument), however, that certain reforms such as an increase in the availability of legal aid might lead to an overburdening of the courts, it does not follow that other reforms cannot at once reduce costs and increase settlement rates. In Sir Gerard Brennan’s view, the correlation between cost and case duration/delay simply emphasises ‘the necessity for court procedures to be simple and for methods of dispute resolution that reduce the costs that would otherwise be incurred by going to trial’.¹⁴⁵ This view is supported by research conducted by Tim Fry for the ALRC, which indicates that case length and complexity are significant factors in the production of high legal costs. As regards the Family Court, Professor Fry’s analysis suggests that

¹⁴³ *Courier Mail* (April 16th 2002); 5(1) *ADR Bulletin* 16.

¹⁴⁴ Justice Kenneth Hayne, ‘The Vanishing Trial’ (Paper presented at the Supreme and Federal Court Judges Conference, 23 January 2008), 2.

¹⁴⁵ Brennan, above n 110.

the cost of a case is determined by the total number of court events, whether the case went to hearing or not, whether there was legal aid funding or not, and the number of experts involved. Furthermore, evidence was found to suggest that the incremental costs of an additional directions hearing was significantly lower than the incremental cost of any other court event.¹⁴⁶

As regards the Federal Court, Professor Fry's analysis indicates that

the cost of a case is determined by the number of parties involved, whether "end of discovery" was reached, the number of experts, the total number of court events, and whether alternative dispute resolution (ADR) was attended.¹⁴⁷

The ALRC subsequently recommended revisions to enhance the efficiency of existing case management systems and an increase in the use of 'prehearing conferences'.¹⁴⁸ It also provided cautious support for the continued development of court-connected ADR.¹⁴⁹ Ronald Sackville has summarised the ALRC's recommendations as follows:

The *Report* considered that active case management, together with procedural reforms designed to encourage early disclosure of evidence and maximise opportunities for settlement, would be likely to decrease the cost of civil litigation, provide flexibility in the ways in which courts resolve

¹⁴⁶ Fry, above n 115, 12.

¹⁴⁷ Fry, above n 115, 14.

¹⁴⁸ Australian Law Reform Commission, above n 103, [17.41].

¹⁴⁹ Ibid [6.59]-[6.66].

disputes, promote early settlement and utilise scarce court resources more effectively.¹⁵⁰

Various procedural amendments have been implemented in Australia over the past 20 years or so, either in the form of legislation (some of which responds to the recommendations made by the law reform inquiries discussed above)¹⁵¹ or at the judiciary's own motion through the exercise of inherent jurisdiction.¹⁵² Ronald Sackville has concluded that the 'changes in the judicial function identified in the *Access to Justice Report* in 1994 have continued apace. [For example] case management is regarded as an article of faith by most Australian courts'.¹⁵³ These changes are considered in more detail in Chapter 7.

Various overseas law reform agencies have also championed an increase in the case management role of judges and the use of ADR,¹⁵⁴ as opposed to an increase in litigant funding (the approach favoured in the first-wave).¹⁵⁵ In England and Wales,

¹⁵⁰ Justice Ronald Sackville, 'From Access to Justice to Managing Justice: The Transformation of the Judicial Role' (Paper presented to the Australian Institute of Judicial Administration Annual Conference, Brisbane, 12 – 14 July 2002), 5.

¹⁵¹ For example, a number of Australian States have introduced 'overriding objectives' in their rules of civil procedure, requiring judges to draw a balance ('proportionality') between quantitative-efficiency and qualitative-justice: *Rules of the Supreme Court 1971* (WA) O1 r 4B; *Supreme Court (General Civil Procedure Rules 1996* (Vic), r 1.14; *Uniform Civil Procedure Rules 1999* (Qld), r 5; *Civil Procedure Act 2005* (NSW), s 56; *Supreme Court Rules 2006* (SA) r 3.

¹⁵² For example, case management has been developed primarily by the Australian Courts. See below Chapter 6 nn 68-79 and accompanying text.

¹⁵³ Sackville, above n 150, 23.

¹⁵⁴ In 1994, the AJAC noted that, 'there are many proposals for procedural reforms currently being considered to reduce the cost of litigation and to increase the opportunities for early settlement'. Access to Justice Advisory Committee, above n 108, xliii. See also: Ontario Law Reform Commission *Rethinking civil justice: Research studies for the civil justice review* Vols 1 and 2 Ontario Law Reform Commission Toronto 1996 (Ontario, Canada). In an Irish context, see Justice Susan Denham, Working Group on a Courts Commission, *First Report: Management and Financing of the Courts* (1996). Justice Susan Denham, Working Group on a Courts Commission, *Second: Case Management and Court Management* (1996). Justice Susan Denham, Working Group on a Courts Commission, *Third Report: Towards the Court Service* (1996).

¹⁵⁵ Note, however, that the VLRC called for an increase in legal aid funding as well as increased case-management and ADR: 'The commission believes the government should not rely on the pro bono

for example, the recommendations of the Woolf Report led to the introduction of a unified *Civil Procedure Rules 2005* (CPR 2005 (England and Wales)) providing for, inter alia, greater case management on the part of judges (by way of referral to ADR)¹⁵⁶ and the power for judges to reduce final awards if mediation orders are ignored.¹⁵⁷ In 2002, the Lord-Chancellor's Department reported that the Woolf reforms appeared to have had a significant effect upon the number of claims issued in the County Court and High Court.¹⁵⁸ According to that report, between April 1999 and May 2001, 20% fewer claims were issued in the County Court, compared to a 19.6% decrease in the High Court in 2001.¹⁵⁹ Statistical analyses undertaken by the Department of Constitutional Affairs, however, indicate that the average cost of settling claims has actually increased since the reforms were introduced.¹⁶⁰

Will Judicial Mediation 'Improve' Civil Justice?

In summary, law reform agencies, jurists and academics have recommended an increase in judicial control over the trial process, and the introduction or enhancement of measures such as prehearing events or ADR. These recommendations may be expressed in an aspirational sense as civil justice 'goals'. As a prehearing event which increases judicial participation and control over the trial process, judicial mediation has the potential to further both of these goals. This is assuming, however, that mediation offers some tangible benefit/s over and above litigation and/or existing

sector to fulfil what is a fundamental government responsibility ... Adequate legal aid funding is an essential component of the civil justice system'. Victorian Law Reform Commission, above n 128, 614.

¹⁵⁶ *Civil Procedure Rules 2005* (England and Wales) r 1.4(2).

¹⁵⁷ *Civil Procedure Rules 2005* (England and Wales), r 44.5 (3). These procedures also support the further integration of ADR processes by providing a specific opportunity for participants to opt for ADR early in proceedings (*Civil Procedure Rules 2005* (England and Wales) r 26.4(1)).

¹⁵⁸ Lord Chancellor's Department, *Civil Justice Reform Evaluation – Further Findings* (2002).

¹⁵⁹ Lord Chancellor's Department, above n 158, [3.1]-[3.12].

¹⁶⁰ United Kingdom Department of Constitutional Affairs, above n 111, [7.9]-[7.12].

prehearing events. The following section provides an overview of research undertaken as to the effectiveness of mediation. While none of this research relates specifically to ‘judicial’ mediation, it does indicate that judicial mediation has the potential to enhance efficiency - without undermining the quality civil justice.

Will judicial mediation undermine the quality of civil justice?

Whereas access to justice reforms have sought to provide less costly alternatives to formal adjudication and the streamlining of existing machinery, they have not typically been implemented as a means of improving the quality civil justice per se. This is principally because:

Access to *justice* can only ever mean, in broad institutional and systemic terms, relatively equitable access to the legal *process*. Access to the system is no guarantee of a successful outcome from the process, and thus is no guarantee of litigant satisfaction in all cases.¹⁶¹

However, and as Cappelletti and Garth make clear, for access to be truly equal the provision of ‘quality’ justice must be equal as well.¹⁶² Legal systems have ‘two basic purposes ... First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just’.¹⁶³ ADR researchers typically employ ‘individual’ justice measures to assess the effectiveness of dispute resolution processes. These may reflect ‘efficiency’ objectives (such as cost, timeliness and

¹⁶¹ Australian Law Reform Commission, *Review of the federal civil justice system*, ALRC DP 62 (1999) [1.81].

¹⁶² Cappelletti and Garth, above n 84, 186.

¹⁶³ Ibid 182. In its review of the civil and criminal justice system in Western Australia, the Law Reform Commission of Western Australia identified broadly similar objectives for the civil justice system: ‘The civil justice system should be managed in order to be expeditious, proportionate, and both procedurally and substantively just’. Law Reform Commission of Western Australia, above n 128, 47.

settlement rates), or ‘quality’ objectives (such as disputant satisfaction, outcome durability and perceived fairness).¹⁶⁴ In contrast, traditional legal scholarship measures the quality of justice by reference to social/jurisprudential concepts (such as the rule of law, due process and the separation of powers), and proponents of this approach argue that the ‘quality’ of civil justice is threatened by the pursuit of individual justice goals (and efficiency goals in particular).¹⁶⁵

Disagreement as to how civil justice systems should be measured reflects two interrelated tensions. The first tension is between systemic measures of quality, on the one hand, and individual measures of quality, on the other (what is more important, the judiciary’s public and governmental role, or the just and efficient resolution of individual disputes?) This tension is widely acknowledged in the literature.¹⁶⁶

According to John Leubsdorf, for example:

Ultimately, our judgment of a procedural system should go beyond its average speed, cheapness, and accuracy. We should think about what suits we want it to foster or discourage. We should think about how its procedures will affect litigants and others. We should recognize it as part of the governmental system, wielding powers that must be properly allocated and controlled. Very likely concerns such as these greatly influenced the creators

¹⁶⁴ Kathy Mack, *Court Referral to ADR: Criteria and Research* (2003) 19, 25.

¹⁶⁵ See in particular, Resnik, above n 63; Judith Resnik ‘Many doors? Closing doors? Alternative dispute resolution and adjudication’ (1995) 10(2) *Ohio State Journal on Dispute Resolution* 211.

¹⁶⁶ See, for example, Astor and Chinkin, above n 5, 258; Carrie Menkel-Meadow, ‘Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted of the Law of ADR’ (1991) 19 *Florida State University Law Review* 1, 6. Given this apparent conflict, it is notable that the ALRC was only ‘explicitly directed’ by its terms of reference ‘to issues of cost, accessibility and efficiency’, and that it was left to the ALRC to identify the maintenance of ‘fair, open, dignified, and careful processes’ as an implicit requirement of the word ‘justice’. Australian Law Reform Commission, above n 103, [1.11], [1.85]. The Western Australian Law Reform Commission was similarly directed toward matters of expediency alone, although like the ALRC it recognised that the ‘civil justice system should be managed in order to be expeditious, proportionate, and both procedurally and socially just’. Law Reform Commission of Western Australia, above n 128, 47.

of past and present procedural systems, however loudly they may have proclaimed their desire to make lawsuits cheaper, speedier, and more accurate.¹⁶⁷

This tension is a central theme of this thesis, and developed in the following chapters.

The second tension, which focuses more specifically on measures of individual justice, is between what Carrie Menkel-Meadow has described as ‘quantitative-efficiency’ and ‘qualitative-justice’.¹⁶⁸ This tension is also widely acknowledged in the literature.¹⁶⁹ According to Cappelletti and Garth, for example:

The greatest danger [in civil justice reform] is the risk that streamlined, efficient procedures will abandon the fundamental guarantees of civil procedure – essentially, those of an impartial adjudicator and of the parties right to be heard ... We should not forget the fact that, after all, highly

¹⁶⁷ John Leubsdorf, ‘The myth of civil procedure reform’ in Sergio Chiarloni, Peter Gottwald, Adrian Zuckerman (ed), *Civil justice in crisis: Comparative perspectives of civil procedure* (1999) 67. Justice Ronald Sackville has also cautioned that ‘the strengths of the current system may be overlooked or at least given insufficient attention. This carries with it with the further danger that unrealistic expectations will be created, specifically, that the courts (as distinct from other elements in the civil justice system) can continue to perform their traditional functions, yet comply with heightened community expectations that justice should be speedy, cheap and effective’: Justice Ronald Sackville ‘The civil justice system - the process of change’ (Paper presented to the Beyond the Adversarial System Conference, Brisbane 10-11 July 1997) 8; Justice Ronald Sackville, ‘Reframing the Civil Justice System: The Case for a Considered Approach’, in Helen Stacey and Michael Lavarch, *Beyond the Adversarial System* (1999) 40.

¹⁶⁸ Carrie Menkel-Meadow, ‘Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted of the Law of ADR’, above n 166. Numerous different expressions have been used to describe these two objectives. Justice Geoffrey Davies and JS Leiboff, for example, have described it as one of ‘Rolls Royce’ justice versus ‘Holden’ justice. Reforming the civil litigation system: Streamlining the adversarial framework’ (1995) 25 *Queensland Law Society Journal* 111, 114.

¹⁶⁹ See also Adrian Zuckerman, who concludes that the ‘global aspect raises, therefore, questions of the relationship between the investment of resources and the performance of the system as a whole. There is, however, a further aspect to cost. It concerns not the performance of the system as a whole, but the relationship between cost and individual justice’. Adrian Zuckerman, above n 104, 89.

technical procedures have been so moulded through many centuries of efforts to reduce arbitrariness and injustice.¹⁷⁰

It is axiomatic that the pursuit of efficiency can be no guarantee of quality.¹⁷¹ There is disagreement, however, as to whether (or to what extent) quantitative-efficiency and qualitative-justice are necessarily incompatible. Judith Resnik has argued that, as a result of the case-management role of judges (which she argues encourages judges to value the number of case dispositions over the quality of judgments)¹⁷² the adjudicative process is in danger of disappearing.¹⁷³ This fear is premised upon a belief in the innate superiority of the traditional judicial process, and that this process is threatened by quantitative-efficiency reforms:

The assumption of many proponents, that ADR will increase the options available to litigants within the publicly financed system may not be borne out. As the state makes alternative dispute resolution its own, both ADR and adjudication are being reconceptualised. As we proceed into the next century, the commitment to twentieth century style adjudication is waning. In this

¹⁷⁰ Cappelletti and Garth, above n 84, 291. It is worth noting, given these warnings, that according to the VLRC only qualitative-justice objectives are 'fundamental' requirements of the civil justice system. The VLRC identified eight 'fundamental' goals: Fairness, openness, transparency, proper application of the substantive law, independence, impartiality, accountability. The VLRC identified eight 'desirable' goals: accessibility, affordability, equality of arms, proportionality, timeliness, getting to the truth, consistency and predictability. Victorian Law Reform Commission, above n 128, 94-98. The goals identified by the VLRC are broadly comparable to a list of goals produced in 1996 by the Canadian Bar Association, although in the latter no distinction was drawn between desirable and fundamental goals. The Canadian Bar Association identified 13 goals: Justice, fairness, independence, accountability, transparency, responsiveness, understandability, accessibility, affordability, timeliness, proportionality, certainty, and efficiency. *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association National Task force on Systems of Civil Justice, August, 1996), 28.

¹⁷¹ Australian Law Reform Commission, above n 103, [1.81].

¹⁷² Resnik, 'Managerial Judges', above n 63, 422.

¹⁷³ Ibid 445.

interaction, we may soon find ourselves with a narrower, not a richer, form or range of forms of dispute resolution.¹⁷⁴

John Leubsdorf has similarly cautioned that ‘the most firmly implanted myth of procedural reform may be that we can talk usefully about it as simply an effort to increase judicial efficiency, without talking about our visions of procedural and social justice’.¹⁷⁵ For Judith Resnik and John Leubsdorf, then, quantitative-efficiency and qualitative-justice are in a state of general conflict, and (left unchecked) the blending of ADR and adjudication threatens to dilute the quality of the latter.¹⁷⁶

In contrast, various commentators and organisations in Australia conclude that traditional adjudication and ‘quality’ justice are not synonymous, and that quantitative-efficiency and qualitative-justice are not necessarily opposed. In the considered view of the ALRC, for example, the ‘dichotomy’ between quality and efficiency is a false one.¹⁷⁷ Chief Justice Gleeson has similarly noted that ‘expediency ... is not regarded by the law as necessarily antithetical to justice,’¹⁷⁸ and in evidence to the ALRC the Victorian Legal Aid Board stated that concepts ‘such as

¹⁷⁴ Resnik ‘Many doors? Closing doors? Alternative dispute resolution and adjudication’, above n 165, 257-261.

¹⁷⁵ Leubsdorf, above n 167, 67. Justice Ronald Sackville has also cautioned that ‘the strengths of the current system may be overlooked or at least given insufficient attention. This carries with it with the further danger that unrealistic expectations will be created, specifically, that the courts (as distinct from other elements in the civil justice system) can continue to perform their traditional functions, yet comply with heightened community expectations that justice should be speedy, cheap and effective’: Justice Ronald Sackville ‘The civil justice system - the process of change’, above n 167.

¹⁷⁶ On the other hand, Carrie Menkel-Meadow argues out that, as ADR processes such as mediation are absorbed within the formal system ‘the power of our adversarial systems will co-opt and transform the innovations designed to redress some, if not all, of our legal ills’. ‘Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted of the Law of ADR’, above n 166.

¹⁷⁷ Australian Law Reform Commission, above n 103, [1.88].

¹⁷⁸ Chief Justice Murray Gleeson, ‘The Future of Civil Justice – Adjudication or Dispute Resolution?’ (1999) 9 (3) *Otago Law Review* 449, 450.

‘best decisions’, ‘best lawyers’, ‘Rolls-Royce justice’ ... are a fiction and are not borne out by the quality of the decisions made.¹⁷⁹

From an individual disputant’s perspective it simply makes no sense to view efficiency in contradistinction with quality, because the former is a key determinant of the latter. In other words, ‘disputant satisfaction’ will be influenced by how efficient a process is. To conclude that the blending of ADR and adjudication will necessarily undermine the quality of the trial process for the individual would be to ignore this elementary correlation. Whether certain efficiency reforms might undermine the quality (or integrity) of the civil justice system from a systemic perspective is another matter, and considered later in this thesis.

Of course, to say that the distinction between quality and efficiency is false is not to say that ADR processes necessarily lead to greater efficiency and quality than litigation, but is an underlying premise of ADR theory that this is generally the case. According to Roger Fisher and William Ury’s thesis, for example, non-determinative interest-based processes (such as some forms of mediation) lead to wiser, more amicable, and more efficient outcomes than determinative positional processes (such as litigation).¹⁸⁰ In another pioneering article, Carrie Menkel-Meadow stated that

the *quality* of dispute resolution is improved when models other than the formal adjudication model are used. Solutions to disputes can be tailored to

¹⁷⁹ Victoria Legal Aid, (Consultation with the ALRC, Melbourne, 26 August 1999).

¹⁸⁰ The authors state that, ‘in contrast to position bargaining, the principled negotiation method of focusing on basic interests, mutually satisfying options, and fair standards typically results in a *wise* agreement. The method permits you to reach a gradual consensus on a joint decision *efficiently* without all the transaction costs of digging into decisions only to have to dig yourself out of them. And separating people from the problem allows you to deal directly and empathetically with the other negotiator as a human being, thus making possible an amicable agreement.’ Roger Fisher and William Ury, *Getting to Yes: negotiating an agreement without giving in* (first published 1983, 10th ed 1999), 14.

the parties' polycentric needs and can achieve greater party satisfaction and enforcement reliability.¹⁸¹

There is some empirical evidence to support these views.¹⁸² However, it should be acknowledged from the outset that a great deal of the research undertaken into the effectiveness of ADR has failed to yield definitive results. This is partly because

the number and complexity of the many variables make it very difficult to draw reliable general conclusions when the large mass of often conflicting research results is reviewed. It is also not possible to identify and isolate all possible variables when discussing the results of any particular research project. Research conclusions necessarily concentrate on a few factors or variables or qualities and may not specifically isolate certain other variables.¹⁸³

¹⁸¹ Carrie Menkel-Meadow, 'For and against settlement: uses and abuses of the mandatory settlement conference' (1985) 33 *UCLA Law Review* 485, 487. Carrie Menkel-Meadow's notion of 'tailored' dispute resolution is closely connected to the theory of 'individualised justice' advanced by Patrick Atiyah. Individualised justice (a term first coined by Professor Atiyah in an address at Oxford University in 1978) is the theory that the law continues to develop substantively and procedurally away from general principles and towards laws and procedures which aim 'to find solutions, especially discretionary solutions, tailored to the circumstances of the individual dispute'. Patrick Atiyah, *From Principles to Pragmatism* (1978). See also Chief Justice Murray Gleeson, 'Individualised justice -- The holy grail' (1995) 69 *Australian Law Journal* 421, 430. Whereas individualised justice focuses on the development of substantive and procedural laws within the judicial system and is therefore concerned solely with adjudication, however, Carrie Menkel-Meadow is concerned with the broader civil justice system. Individualised justice is also central to the principle of proportionality, discussed in greater detail below. In a more recent article, Carrie Menkel-Meadow stated that processes 'produce different kinds of outcomes -- there are no universal processes that will always be better, fairer, or more efficient than others ... Different kinds of disputes will call for different kinds of "handling," "managing," or resolution.' Carrie Menkel-Meadow, 'The Intellectual Founders of ADR', above n 76, 36.

¹⁸² See, for example, Mack, above n 164, 25-36; Joan Kelly, 'A Decade of Divorce Mediation Research' (1996) 34(3) *Family and Conciliation Courts Review* 373, 377; Jessica Pearson, 'Family Mediation' in Susan Keilitz (ed), *National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings - Implications for Courts and Future Research* (1994) 63.

¹⁸³ Mack, above n 182, 22.

Given these difficulties, can it be said (as is implicit in the suggestion that judges should mediate) that mediation is, in fact, ‘effective’?

Is Mediation Effective?

In light of the fact that the primary object of the access to justice movement has been to increase efficiency, this section considers the effectiveness of mediation by reference to settlement rates and cost savings (including time).¹⁸⁴ While qualitative criteria such as durability of outcome, fairness and disputant satisfaction are inextricably linked with efficiency, they are not considered here in isolation for the reasons set out above.

Does mediation increase settlement rates?

It is a familiar adage that ‘most cases settle’. Commentators and law reform agencies observe that, while adjudication lies at the heart of the civil justice system, the majority of civil disputes do not require a formal judgment.¹⁸⁵ Prehearing settlements may be achieved through private negotiation or through participation in one of the various ADR processes attached the formal court system. However, it is difficult to accurately gauge the overall number of disputes that do, in fact, ‘settle’. For one thing, statistical analyses are typically drawn from court records – precluding disputes

¹⁸⁴ The data considered below is drawn from two sources in particular: a meta-analysis of existing data undertaken by Kathy Mack in 2003, above n 164, and an empirical analysis of court-connected ADR in Victoria conducted by Tania Sourdin in 2009, *Mediation in the Supreme and County Courts of Victoria*, above n 136.

¹⁸⁵ See, for example, David Weisbrot, ‘Reform of the Civil Justice System and Economic Growth: Australian Experience’ (2003) 6 *Flinders Journal of Law Reform* 235, 245; Boule, above n 5, 139; Victorian Law Reform Commission, above n 128, 89.

which have not entered the formal justice system.¹⁸⁶ In Australia, the number of cases that settle after filing also varies considerably between courts and jurisdictions. Research conducted for the ALRC in 1999, for example, found that only 5% of family law cases required a formal judgment, in contrast with the Federal Court and the AAT¹⁸⁷ where the figures were notably higher (35% and 34% respectively).¹⁸⁸ One possible explanation for this divergence may be the greater number of prehearing events in the Family Court.

While it is difficult to estimate the overall number of disputes that settle and the manner in which they settled, however, it is possible to examine the settlement rates recorded by specific ADR programs. In 2003, NADRAC published statistics detailing the effectiveness of ADR processes conducted by:

1. Courts
2. Tribunals/commissions/authorities
3. Workers compensation conciliation schemes
4. Industry/customer ADR schemes
5. Government ombudsmen
6. Health care complaints schemes
7. Commonwealth funded family mediation services

¹⁸⁶ In the US the figure is commonly estimated as somewhere between 85 and 95%. The Rand Corporation, *Institute of Civil Justice* (various reports), 1987-1992. See also Marc Galanter and Mia Cahill, “‘Most Cases Settle’ Judicial Promotion and Regulation of Settlements’ (1994) 46 *Stanford Law Review* 1339, 1339. The authors point out that this figure can be misleading, as it does not distinguish between settlements reached by mutual agreement (through, for example, negotiation or mediation) and settlements produced through other non-judicial adjudicative processes (such as arbitration or dismissal). However, this distinction does not affect the fact that the majority of cases do not require a ‘judicial’ decision. This is discussed from an Australian perspective below.

¹⁸⁷ While the AAT is not a Ch III court these figures are still informative in the current context.

¹⁸⁸ Australian Law Reform Commission, above n 103, [6.53]; Tania Matruglio & Gillian McAllister *Part one: Empirical information about the Family Court of Australia* (ALRC, Sydney, February 1999) [6.1], [6.5.2].

8. Community mediation services
9. Legal aid commissions
10. Commercial entities.¹⁸⁹

No summary of findings was compiled by NADRAC, and no courts supplied figures detailing the number of cases ultimately requiring judgment. Different courts also adopted different measurement criteria, making comparisons difficult.¹⁹⁰ The figures presented do nevertheless suggest that court-annexed mediation is generally an effective means of finalising disputes.¹⁹¹ In 2000-2001, for example, 45% of cases submitted for mediation by the Family Court were finalised.¹⁹² In 2001-2002, 55% of cases submitted for mediation in the Federal Court were finalised,¹⁹³ and in the same period in the AAT some 77% of all cases filed were finalised through mediation or conciliation (supporting the ALRC's findings).¹⁹⁴ Statistics from State courts were less consistent, and many did not compile complete records. In South Australia, however, the District Court reported that 58% of the cases submitted for mediation in

¹⁸⁹ NADRAC, *ADR Statistics: Published Statistics on Alternative Dispute Resolution in Australia* (2003).

¹⁹⁰ Justice Ronald Sackville has lamented the fact that much 'of the statistical information dutifully compiled by courts and published, for example, in annual reports is of little value'. 'From Access to Justice to Managing Justice: The Transformation of the Judicial Role', above n 150, 22. John Doyle and Chad Jacobi have also suggested that the judiciary should 'avoid wasting precious resources by collecting and reporting information that is of no use to anyone'. John Doyle and Chad Jacobi, 'Judicial Independence and Public Sector Accountability' (2002) 11 *Journal of Judicial Administration* 168, 172.

¹⁹¹ The term 'finalised' is adopted here to indicate the attainment of a final outcome. This is done to avoid any confusion that may be caused by adopting the terms 'settlement' or 'resolution'. The term 'settlement', familiar to legal practitioners, is often used simply to imply a compromise between positions (by the facilitation of positional bargaining). The term resolution may be defined more broadly, as implying an outcome based on 'a process of information sharing, relationship-building, joint-analysis and cooperation'; with a view to 'resolving' the underlying causes of dispute': David Bloomfield, 'Towards Complementarity in Conflict Management' (1995) 32(2) *Journal of Peace Research* 151.

¹⁹² NADRAC, *ADR Statistics: Published Statistics on Alternative Dispute Resolution in Australia*, above n 189, 7.

¹⁹³ *Ibid* 8.

¹⁹⁴ *Ibid* 18.

the period 2000 to 2001 were finalised,¹⁹⁵ and in Western Australia the Supreme Court recorded that mediation finalised 77% of cases referred during the same period.¹⁹⁶

Private mediation providers reported generally higher finalisation rates than court-annexed services. For example, in 2000 to 2001, Legal Aid New South Wales and Legal Aid Victoria reported finalisation by family conferencing in 89% and 80% of cases respectively.¹⁹⁷ Community mediation centres reported similar figures. In 2000 to 2001, community mediations in the ACT resulted in verbal or written agreements in 77% of cases.¹⁹⁸ In the same period in NSW 84% of community mediations were finalised,¹⁹⁹ and in 2001 to 2002 in Queensland 84% of community mediations were finalised.²⁰⁰

In a subsequent report, NADRAC concluded that, 'rates of agreements seem to be consistent across diverse forms of mediation and service types (about 50-85%)'.²⁰¹ In an abstract sense these figures suggest that mediation is indeed effective, and John Wade has observed that:

There are now many surveys in Australia and various states of the United States of America, which consistently show that highly trained, debriefed,

¹⁹⁵ NADRAC, *ADR Statistics: Published Statistics on Alternative Dispute Resolution in Australia*, above n 189, 13.

¹⁹⁶ Ibid 16.

¹⁹⁷ Ibid 49. An earlier article notes that 88% of legal aid mediations in Queensland were successful, but does not provide a source or time-frame: Bernadette Rogers, 'Multiple Roles in ADR' (1999) 2 (1) *The ADR Bulletin* 1, 1.

¹⁹⁸ NADRAC, *ADR Statistics: Published Statistics on Alternative Dispute Resolution in Australia*, above n 189, 43.

¹⁹⁹ Ibid 44.

²⁰⁰ Ibid.

²⁰¹ NADRAC, *Summary of Research on ADR Effectiveness* (Internal document), cited in Mack, above n 164, 26.

problem-solving mediation services (especially in family and workers compensation disputes), staffed by wellpaid mediators, who use an intake process, are consistently successful in that they have moderate to very high ... levels of settlement.²⁰²

However, for these figures to be meaningful consistent benchmarks or indicators are required, and (as John Wade acknowledges) these are often inadequate or unobtainable in ADR research.²⁰³ The more useful question therefore, at least in the current context, is whether mediation *increases* settlement rates.²⁰⁴

Unfortunately, existing research does not overwhelmingly support the proposition that mediation increases settlement rates.²⁰⁵ Indeed, Kathy Mack has concluded that most evaluations of ADR programs 'showed no impact or mixed results on settlement rates'.²⁰⁶ The bulk of comparative research as to the effectiveness of mediation has

²⁰² John Wade 'Current Trends and Models in Dispute Resolution Part II' (1998) 9 *Australasian Dispute Resolution Journal* 113, 115.

²⁰³ Ibid 114. See also, John Doyle and Chad Jacobi, above n 190, 172.

²⁰⁴ Mack, above n 164, 25. However, much of the research undertaken does not necessarily reflect this distinction in reality. According to Kathy Mack, expressions 'of satisfaction are very likely to involve some degree of comparison, even if implicit and uninformed, between the ADR process and outcome and what is thought would have happened had the dispute been litigated or resolved in some other way'. Above n 164, 21.

²⁰⁵ Kathy Mack concludes that it is 'difficult to draw general or widely applicable conclusions from this body of research'. Ibid 22.

²⁰⁶ Kathy Mack, above n 164, 29, citing: Kenneth Kressel and Dean Pruitt (eds) *Mediation Research: The Process and Effectiveness of Third Party Intervention* (1989); Susan Keilitz, 'Court-Annexed Arbitration' in Susan Keilitz (ed), *National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings - Implications for Courts and Future Research* State Justice Institute (1993); James Kakalik, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (1996) 53; Clarke, Stevens and Gordon, 'Public Sponsorship of Private Settling: Court-ordered Civil Case Mediation' (1997) 19(3) *The Justice System Journal* 311; Sharon Press, 'Florida's Court-Connected State Mediation Program' in Edward Bergman and John Bickerman (eds) *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* (1998), Nancy Welsh, 'Alternative Dispute Resolution in Minnesota - An Update on Rule 114' in Edward Bergman and John Bickerman (eds) *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* (1998), 215; Robert Hann and Carl Baar, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Executive Summary and Recommendations* Ontario (2001) 2; Deborah Hensler, 'In Search of "Good" Mediation' in Joseph Sanders and V.Lee Hamilton (eds) *Handbook of Justice Research in Law* New York, (2001) 258; Roselle Wissler 'Court

been undertaken in North America, though, and may not reflect the position in Australia. Indeed, in a recent study of court-annexed mediation in the Victorian Country and supreme courts, Tania Sourdin found that mediation plays a significant role in the production of settlement:

[B]oth the survey and court-file data suggest that mediation is one of the most frequently used processes to finalise Supreme and County Courts disputes. In fact the survey and court-file data suggest it is the most frequently used process.²⁰⁷

The survey results indicated that 43.2% of cases were finalised by mediation, compared to just 7.4% at trial. The court-file data was less dramatic, indicating that 16.1% of cases were finalised by mediation compared to 10.1% at trial. However, Professor Sourdin hypothesises that the divergence between survey and court-file data may be explained on the basis that ‘a possible 30 per cent of the ‘dismissed/discontinued’ cases [recorded in the court-file data] were finalised at mediation’.²⁰⁸

Even if these figures are representative of mediation in other Australian jurisdictions, however, and mediation is the most commonly used process for finalising disputes, this does not mean that mediation has necessarily increased settlement rates. Mediation may simply provide a structured alternative to negotiating on the ‘court house steps’. As Kathy Mack observes:

Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17 *Ohio State Journal on Dispute Resolution* 641, 672.

²⁰⁷ Sourdin, *Mediation in the Supreme and County Courts of Victoria*, above n 136, 136.

²⁰⁸ Sourdin, *Mediation in the Supreme and County Courts of Victoria*, above n 136, 136.

[S]ettlement rates per se may not tell us anything about the ADR program; the cases that settled might well have settled anyway, as most do. As trial rates are so low, it is very difficult to show any statistically significant reduction in trial rates as a result of ADR ... Comparisons of adjudication and ADR sometimes fail to consider the impact of settlement negotiated by lawyers, so that cases resolved through ADR may have resolved anyway through conventional negotiation.²⁰⁹

Various commentators have also criticised the use of settlement rates as a measure of effectiveness, as it ignores qualitative factors such as outcome durability and disputant satisfaction.²¹⁰ While settlement rates may be a flawed determinant of success when viewed in isolation, however, they can be useful as part of a broader, multi-faceted analysis of efficiency. As discussed above, Tim Fry has observed that costs in the Federal and Family Courts are directly related to the total number of court events and, in the case of the Family Court, whether the case went to trial.²¹¹ Thus, a more reliable indication of effectiveness can be obtained by determining whether ostensibly high rates of mediated settlement correlate with reported decreases in cost and case duration.²¹²

²⁰⁹ Mack, above n 164, 19 - 21, citing Susan Keilitz 'Civil Dispute Resolution Processes' in Susan Keilitz (ed), *National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings - Implications for Courts and Future Research* State Justice Institute (1993) 43; Steven Clarke and Elizabeth Gordon 'Public Sponsorship of Private Settling: Court-ordered Civil Case Mediation' (1997) 19(3) *The Justice System Journal* 311.

²¹⁰ Mack, above n 164, 20, citing Galanter and Cahill, above n 186; Kelly, above n 182, 375; Kressel and Pruitt, above n 206, 400-401; Raymond Whiting, 'Family Disputes, Non-Family Disputes and Mediation Success' (1994) 11 *Mediation Quarterly* 247, 251.

²¹¹ Fry, above n 115, 12, 14.

²¹² There is a correlation between cost and case duration because a reduction in the latter will ordinarily lead to a reduction in the former: Sourdin, *Mediation in the Supreme and County Courts of Victoria*, above n 136, 140.

Does mediation reduce the cost and/or duration of litigation?

In 2002, in a closing address to a symposium on mediation 25 years after the Pound Conference, Frank Sanders opined that:

We boast liberally about the time- and money-saving advantages of mediation, but there is little in the way of rigorous research to back up this claim. Nor is this merely a question of academic interest. In times of tight budgets, legislatures are prone to ask for proof that adoption of mediation programs will save money. So far as I know, except in very isolated specialized settings, there is no such research ... To be sure, such research would be incredibly difficult to do ... A further complexity would arise if one sought to take account of the claimed superiority of mediation over time in reducing future disputes, this requiring a longitudinal study. One would also need to distinguish between cost-savings to clients (caused in part by lower attorney fees) and cost savings to the court system.²¹³

Professor Sander's comments were a response to the development of mediation in the US,²¹⁴ but the same difficulties have limited Australian scholarship. In the context of family law disputes, Kathy Mack's review of existing research found, 'some evidence of cost benefits for participants in mediation, but the benefits for the courts [were] less clear'.²¹⁵ She also found that most evaluations of court referred ADR in general civil

²¹³ Frank E. A. Sanders, 'Some Concluding Thoughts' (2002) 17 *Ohio State Journal on Dispute Resolution* 705, 706.

²¹⁴ For a more in-depth analysis of the effectiveness of court-annexed mediation in the US, see: Douglas A. Van Epps, 'The Impact of Mediation on State Courts' (2002) 17 *Ohio State Journal on Dispute Resolution* 627; Roselle L Wissler, 'Court Connected Mediation in General Civil Cases: What we know from empirical research. (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

²¹⁵ Mack, above n 164, 28, citing: Kelly, above n 182; Pearson, above n 182; Jessica Pearson and Nancy Thoennes, 'Divorce Mediation: Reflections on a Decade of Research', in Kenneth Kressel and

litigation ‘showed no impact or mixed results on ... time or cost savings’.²¹⁶ The majority of research consulted to reach this conclusion was in fact American in origin, but English and Australian research is also contradictory. In England and Wales, the Department of Constitutional Affairs noted that 45% of respondents to a survey conducted by the Law Society in 2002 believed that an increase in court-annexed ADR following the Woolf reforms had resulted in a ‘front-loading of costs’ (that is to say, a transfer of costs from trial to negotiation and mediation etc).²¹⁷ In Australia, the ALRC has similarly acknowledged that increased ‘demands on parties at earlier stages may increase and ‘front end load’ costs for matters’.²¹⁸ This danger is also emphasised by Tim Fry’s finding (above) that the number of prehearing events in the Family and Federal Court is associated with an increase in cost.

On the other hand, Tania Sourdin’s survey of disputants in Victoria revealed an estimated median cost-saving of \$30,000 when a dispute was finalised by mediation. Legal practitioners in the same survey estimated that mediation reduced costs in 82% of cases, and Professor Sourdin observes that ‘a comparison of total legal and related professional costs spent during the dispute ... suggests that mediation is the least costly method of finalisation and that the process can result in cost savings for litigants’.²¹⁹ Further research is required in order to determine whether these findings are representative of other Australian jurisdictions, but on the basis of the Victorian data mediation would appear to result in cost savings, a reduction in case duration, and an increase in the number of early settlements.

Dean Pruitt, (eds) *Mediation Research: The Process and Effectiveness of Third Party Intervention* (1989), 27-28.

²¹⁶ Mack, above n 164, 29.

²¹⁷ United Kingdom Department of Constitutional Affairs, above n 111, [7.2].

²¹⁸ Australian Law Reform Commission, above n 103, [4.20].

²¹⁹ Sourdin, *Mediation in the Supreme and County Courts of Victoria*, above n 136, 140.

Will judicial mediation be effective?

In summary, although quantitative gains (and access to justice in a narrow sense) cannot be the sole object of civil justice reform, the quality of individual justice can be improved by increased efficiency and decreased costs. While existing research does not universally support the proposition that mediation does in fact increase settlement rates and decrease costs, recent research conducted in Australia suggests that it can do so if appropriate referral criteria are implemented and mediators are properly trained.

Of course, none of the research considered above relates specifically to *judicial* mediation, and it is difficult to accurately forecast what if any impact judicial mediation will have upon the efficiency or quality of civil justice in Australia. The limited information available suggests that it is likely to have a positive impact, however. In a recent letter, Judge Sidis reported a ‘high success rate of approximately 95%’ in judicial mediations held in the NSW District Court.²²⁰ In an earlier article, Her Honour had reported a slightly lower, yet still considerable, settlement rate of almost 80% (saving more than 400 court days) in the more than 100 judicial mediations undertaken at that stage.²²¹ There are also positive reports from judicial mediation programs overseas.²²² According to Justice Louise Otis, the architect of

²²⁰ Letter from Judge Margaret Sidis to Iain Field, 20th August 2009. See Appendix.

²²¹ Sidis, ‘Judicial Mediation in the District Court’, above n 36, 74.

²²² See also Peter Spiller, ‘Reflections on best judicial practice’ (2009) 19 *Journal of Judicial Administration* 22. The author discusses the success of referees in New Zealand Disputes Tribunals. Although these referees are not judicial mediators in the sense defined here, as they provide a decision in the absence of settlement, they do seek ‘agreed settlement where appropriate’, and are broadly comparable with judge mediators in this sense. According to Peter Spiller (at 22) the referees who run these tribunals ‘have a remarkably low rate of successful appeals against them. In the period 2006-2008, of the approximate 20,000 Disputes Tribunal cases that were disposed of each year, successful appeals accounted for 0.25% (2006), 0.2% (2007) and 0.17% (2008) of the cases disposed’. The author

Quebec's pioneering judicial mediation program, judicial mediation has been effective in that jurisdiction in five key respects:

1. It reduces costs
2. It reduces delays
3. It encourages party autonomy (disputants gain control over the outcome and avoid the uncertainty of possible appeal).
4. It reflects a 'collective maturity' in litigant/lawyer attitudes (people are increasingly educated about and aware of the drawbacks of formal adjudication)
5. It causes less psychological harm than litigation.²²³

On the basis of the preceding analysis, it seems reasonable to conclude that, in the right circumstances, judicial mediation can increase settlement rates and improve the quality of civil justice. Ensuring that judicial mediation is effective in practice will, of course, require careful implementation and a commitment to ongoing review.

Synopsis of the Thesis

At the beginning of this Chapter it was noted that academic and professional interest in judicial mediation has increased steadily in recent years,²²⁴ and that certain

identifies seven factors which may have enhanced this success: 'Prehearing preparation', 'engaging with the humanity of the parties', 'running a clear and transparent process', keeping focussed in the relevant issues and law', 'being honest with the parties', giving both parties the opportunity to be heard, and 'foreshadowing the essential elements in the decision'.

²²³ Justice Louise Otis, 'Judicial Mediation: Prospects and Issues' (Speech delivered to Seminar of the Victorian Bar, Melbourne, Thursday 14 May 2009). The Chief Justice of the Quebec Court of Appeal has reported that between 1998 and 2006, some 80% of civil, family commercial and criminal disputes submitted that Court's judicial mediation program 'settled successfully after one or two mediation sessions of 3 hours'. Michel Robert, 'Judges as Mediators in Criminal Matters' (Paper presented to the International Society for the Reform of Criminal Law's 20th International Conference, Brisbane 2 – 6 July 2006), 6.

Australian courts may already engage in a form of judicial mediation. At the time of writing, the Victorian Attorney-General, Rob Hulls, is also actively engaged in a campaign to develop a judicial mediation program in that State.²²⁵ It is interesting to note, therefore, that (until recently) there has been relatively little debate as to whether judicial mediation will, in fact, increase the efficiency of civil justice. This may indicate a general acceptance that it will, or it may reflect a preoccupation with broader jurisprudential and constitutional issues raised by the concept. The analysis undertaken in this Chapter demonstrates that judicial mediation does have the potential to increase efficiency. Ultimately, however, it is these broader jurisprudential and constitutional issues with which this thesis is concerned.

Opinion is divided as to whether judicial mediation is compatible with common law notions of due process and the fundamental nature of the judicial function. In some quarters judicial mediation is viewed as a ‘contradiction in terms’,²²⁶ and a threat to the integrity of the judiciary.²²⁷ In other quarters, judicial mediation has been lauded as ‘the cutting edge of legal practice,’²²⁸ and a ‘natural evolution’ of the judicial role.²²⁹ The latter view acknowledges that there is a certain inevitability to further judicial reform; a sentiment echoed by Justice Ronald Sackville, whose conclusions provide a fitting addendum to the preceding analysis:

²²⁴ See above n 2.

²²⁵ Rob Hulls, ‘Changing the Culture of Disputes’ (2005) *The Institute of Arbitrators and Mediators Australia News* 43.

²²⁶ Chodosh, above n 3.

²²⁷ See, for example, the comments of Chief Justice James Spigleman: ‘I do not mean to suggest that improvements in judicial efficiency have not been required, nor that further improvements cannot occur. My proposition is that many advocates of such measures have an inadequate understanding of the way that such steps may adversely affect other values and of the incompatibility of some such measures with fundamental principle, including the principle of open justice’. Chief Justice James Spigleman, above n 62, 379-380. See also Sir Laurence Street, ‘Mediation and the Judicial Institution’, above n 2.

²²⁸ Hulls, above n 225.

²²⁹ Justice Andrew Rogers, ‘Judges in Search of Justice’ (1987) 10 *University of NSW Law Journal* 93, 104.

Whatever view is taken about the limits of the judicial law-making function, the expansion of the role of the courts in managing justice is likely to continue. The process that has been under way for some time is not readily reversed ... It is widely acknowledged that the functions performed by Australian courts changed significantly during the last years of the twentieth century. The changes have usually been explained and understood in terms of case management and the additional responsibilities thereby imposed on judges. It has become clear, however, that case management is only one aspect of a more fundamental shift in judicial responsibilities. Despite the concerns of those who resist the notion that courts should be seen as service providers, the fact is that they have chosen to become accountable in ways that transcend the traditional mechanisms associated with “open justice”. While the core of the judicial function remains both intact and inviolate, the expansion of the judicial role marks a transformation in the relationship between the courts and the wider community. The transformation has yet to run its course.²³⁰

This thesis evaluates these conflicting opinions, and analyses the constitutional and jurisprudential principles upon which they are premised. By applying these principles to the working definition of judicial mediation model outlined at the beginning of this Chapter, the following Chapters demonstrate that judicial mediation can evolve in a manner consistent with the requirements of Ch III of the Commonwealth Constitution, and that this evolution poses no threat to the fundamental precepts of the judicial process or the Australian judiciary more generally.

²³⁰ Sackville, ‘From Access to Justice to Managing Justice: The Transformation of the Judicial Role’, above n 150, 25-27.

Chapters 2 through 6 chart the High Court's interpretation of Ch III of the Constitution, and in particular its interpretation of the term 'judicial power'. The analysis undertaken in these Chapters demonstrates that the High Court has utilised the separation of powers to realise a particular set of rules relating to how legal disputes should be determined, and that these rules have been developed as vehicle for the maintenance of certain rule of law values. This has been achieved by securing four essential jurisdictions; exclusive jurisdiction (isolating the judicial power from legislative interference or usurpation), inherent jurisdiction (securing to the courts the ability to maintain the integrity of their processes), appellate jurisdiction (ensuring an avenue of appeal to the High Court from all Australian courts), and supervisory jurisdiction (providing an element of control over private modes of dispute resolution). Wherever possible, judicial mediation is evaluated by reference to these principles and essential jurisdictions as they are encountered, in order to gradually strip away the illusion that Ch III prohibits the vesting of mediation functions in Australian courts.

Chapter 2 examines the doctrinal foundations upon which the High Court's Ch III jurisprudence has been constructed. This analysis introduces the four essential jurisdictions noted above, and explains that the separation of powers doctrine provides the mechanism by which these jurisdictions are maintained. Two alternative approaches to the separation of judicial power are identified. The first approach is contained within the second limb of the 'separation doctrine', and prevents the vesting in Ch III courts of non-judicial functions or functions not incidental to the exercise of judicial power. The second approach adopts notions of 'incompatibility' to control the vesting of functions in State courts, territory courts, and federal judges acting in their

private capacity. The principles stemming from both of these approaches will affect the development of judicial mediation, whether implemented by primary legislation or rules of court.

Chapters 3 and 4 examine the implications of Ch III for Ch III courts (that is to say, federal courts, State courts and territory courts vested with federal judicial power). Chapter 3 demonstrates that, although mediation does not fall within the core meaning of the term judicial power (because it does not result in a binding determination), the power to mediate may nevertheless be vested in Ch III courts as function incidental to the exercise of that power (as is generally the case in respect of prehearing functions). That being so, whether judges can mediate will turn upon the extent to which the mediation process is consistent with the procedural implications derived by the High Court from Ch III.

Chapter 4 unpacks the procedural implications of Ch III, and shows that the separation doctrine has resulted in a ‘judicial process’ implication. This implication comprises two broad components – a ‘due process’ component and an ‘integrity’ component – each of which has been developed separately by the High Court. While the former is now fairly well-established (and can be generally expressed in terms of procedural fairness), the requirements of the latter remain far from certain. It is nevertheless apparent that both components of the judicial process implication are firmly tethered to notions of impartiality, and it is concluded that constitutional impediments to judicial mediation are most likely to arise in this area. Chapter 4 also examines the High Court’s approach to the interpretation of statutory provisions

which affect court procedures, and demonstrates that a presumption in favour of legislative validity is ordinarily applied.

Chapter 5 explores the *persona designata* exception, which allows federal judges to engage in certain non-judicial functions in their private capacity, and considers the implications of the *Kable* doctrine (the subject of Chapter 6) for State and territory judges acting in their private capacity. While the *persona designata* exception may permit federal judges to engage in a broader range of mediation functions than would otherwise be permissible in Australian courts, it is argued that judicial mediation should not be developed in this way for two reasons: firstly, because the *persona designata* exception has the potential to undermine the separation doctrine, and should be restricted to the conferral of administrative functions of judges; and secondly, because judicial mediation raises important questions about the nature of the judicial process and its relationship with ADR, which are more appropriately determined by the judiciary in the course of the judicial process.

Chapter 6 considers whether Ch III might prohibit or limit judicial mediation in State and territory Courts. This Chapter demonstrates that, although State and territory courts have not traditionally been subject to the requirements of Ch III, certain of the procedural implications drawn in a Ch III context have been extended to State and territory courts by the convergence of two overlapping streams of High Court precedent. The first stream (the '*Kable* doctrine') asserts the High Court's power to strike-down legislation which is 'incompatible' with the vesting of federal judicial power in certain non-federal courts, while the second stream (the '*Spratt* stream') reconceptualises territory courts in a manner comparable with State courts. Chapter 6

demonstrates that, despite the fact that the High Court has the capacity to invalidate State or territory legislation or court rules on the basis that they undermine the institutional integrity of the judiciary, this is highly unlikely to occur in practice. Two primary reasons are offered in support of this conclusion. First of all, the High Court has so narrowed the circumstances in which ‘incompatibility’ will arise under the *Kable* doctrine as to permit all but the most extreme usurpations of judicial power. Given that judicial mediation increases the discretionary power of the court, and that legislative provisions affecting more sensitive judicial functions have satisfied the incompatibility test, it is highly likely that judicial mediation will do so. Second of all, the High Court has consistently applied the same principles of statutory construction as it has in a Ch III context (considered in Chapters 3 and 4). By virtue of this approach, statutory provisions or rules of court will only be held invalid if they cannot be interpreted in a manner consistent with the judicial process. Although this interpretative approach is likely to countenance the implementation of judicial mediation, a preference is expressed for a more purposive interpretative approach which focuses on the object of Ch III. Such an approach, it is argued, would achieve substantially the same outcome for judicial mediation (because efficient court procedures serve the rule of law), whilst also preventing what have, in many cases, amounted to legislative usurpations of judicial power.

In light of the conclusions drawn in Chapters 2 through 6, it is concluded that whether judicial mediation accords with the requirements of Ch III will depend upon whether that process can be carried out in an impartial manner. On this basis, Chapter 7 returns to the ‘wave’ model outlined above, and demonstrates that the access to justice movement has resulted in a multi-jurisdictional increase in judicial control over the

civil trial process. Chapter 7 demonstrates that, whether as a direct result of this trend or not, the processes involved in mediation and adjudication are no longer (and perhaps never were) dichotomous. Rather, mediation and adjudication represent theoretical archetypes at opposing ends of the same procedural spectrum, with the reality of both lying somewhere in between. That being so, it is concluded that the question is not whether judges can mediate in an impartial manner per se, but how far towards the mediation end of the procedural spectrum judicial participation can travel before the rule against bias, or the integrity of the judiciary, is undermined.

The first part of Chapter 8 identifies commonalities in the sources and structure of judicial mediation (as it has developed to date), vis-à-vis processes such as prehearing conferences and less adversarial trials (examined in Chapter 7). Through a comparative analysis with these processes, this analysis demonstrates that judicial mediation has developed (and is likely to continue to develop) within the incidental/inherent jurisdiction of the courts, and that formal procedures are unlikely to be established for its exercise. The second part of Chapter 8 returns to the mediation pressure points identified at the beginning of this Chapter, and plots the boundaries of acceptable practice applicable to judicial mediation on the procedural continuum developed in Chapter 7. A number of mitigating strategies are also identified which will reduce the likelihood of apprehended bias arising. It is concluded that whether bias is reasonably apprehended will depend on the unique circumstances of the case at hand, but that, in any event, the fact that the rule against bias is an implied requirement of Ch III will not affect the operation of the rule in practice. Put differently, unless an enabling provision or rule of court positively requires a court conducting judicial mediation to undermine the rule against bias, the

principles of due process implied by Ch III will not result in the validity of the provision or rule in question.

The final part of Chapter 8 considers whether judicial might undermine the integrity of the judiciary. Building on the analysis undertaken in Chapters 4, 5 and 6, it is concluded that judicial mediation is highly unlikely to undermine the integrity of Australian courts (federal, State or territory). Three primary reasons are offered in support of this conclusion: because judicial mediation satisfies the criterion of integrity (public confidence/impartiality), because procedural discretions are unlikely to be held invalid save in the most extreme circumstances, and because judicial mediation is, in any event, consistent with the underlying object of the separation doctrine and the *Kable* doctrine.

CHAPTER 2

CONCEPTUAL FOUNDATIONS

The following five Chapters trace the development of Ch III jurisprudence in order to determine the manner in which, and extent to which, the Constitution imposes limits on, or liberates opportunities for, judicial mediation. The relevant principles are appraised as they apply in three overlapping domains: Ch III courts, judges (federal State and territory) acting in their private capacity, and State and territory courts.

This Chapter examines the conceptual foundations upon which the principles appraised in the following Chapters are constructed. The Chapter begins by painting, with a very broad brush, a picture of Australia's constitutional landscape. The aim at this stage is not to render a detailed representation of this landscape, but rather an impressionistic image of the influences, assumptions and arrangements which bring substance to the issues explored in this thesis. To this end, analysis focuses on the influence of British and US constitutional theory, the relationship between the separation of powers and the rule of the law, the changing role and status of the States and territories, and the historical relationship between the judicial system and private modes of dispute resolution. This analysis reveals three jurisdictions which are necessary to maintain the rule of law in Australia: 'exclusive', 'appellate', and 'supervisory'.

The second half of this Chapter introduces two alternative approaches to the separation of judicial power. The first approach is encapsulated in the 'separation doctrine', which fosters a strict approach to the separation of judicial power. This

approach identifies and isolates certain functions that are exclusively judicial in nature (the ‘first limb’), and prevents the vesting in Ch III courts of non-judicial functions or functions not incidental to the exercise judicial power (the ‘second limb’). The second limb recognises the need to ensure the ‘inherent’ jurisdiction of the courts, which is in turn identified as the fourth jurisdiction necessary to maintain the rule of law. The second approach offers an alternative to the second limb of the separation doctrine, and allows the vesting of functions in State courts, territory courts and federal judges acting in their private capacity, provided that they are not ‘incompatible’ with the co-exercise of federal judicial power. The implications drawn from both of these approaches will affect the development of judicial mediation, whether implemented by primary legislation or rules of court.

The Commonwealth Constitution: influences, assumptions and arrangements

The Australian Constitution unites what were, prior to Federation in 1901, distinct colonies under British dominion. The British Queen remains the formal head of the Australian State, although in reality she (or rather the British government) no longer retains any direct influence over Australian affairs. The Balfour Declaration on the Status of Dominions in 1926,¹ endorsed by the Australian Prime Minister and the Prime Ministers of Canada, New Zealand, South Africa, and the Irish Free State, indicated the belief of those nations that although ‘united by a common allegiance to the Crown’, they were nevertheless, ‘autonomous Communities within the British

¹ Inter-Imperial Relations Committee, *The Balfour Declaration on the Status of Dominions* (London, November 15, 1926).

Empire, equal in status, in no way subordinate one to another'.² The sentiment of these words went unrealised in Australia until they were finally affirmed by the British *Statute of Westminster* in 1931,³ and later by the *Australian Statute of Westminster Adoption Act 1942* (Cth).⁴

The Constitution itself is contained in S9 of the *Commonwealth of Australia Constitution Act 1900* (UK), which followed a positive referendum in each of the colonies, with the exception of Western Australia, between 1898 and 1900. Western Australia held a referendum shortly thereafter, and was included as an original State at that time.⁵ Although enacted by the Imperial Parliament, the Bill was drafted by Australian delegates to the National Australasian Convention during a series of assemblies held between 1891 and 1897.⁶ Patrick Parkinson has observed that;

A basic question for the delegates to these assemblies was how to structure a federation within the Westminster tradition of government. Britain, of course, could provide no experience with federalism, since the Scots, the Welsh and the Irish were part of a United Kingdom, not a federated one ... [I]t was inevitable that the delegates should look to the Constitution of the United States as the other major model of federation within the English speaking world.⁷

² Inter-Imperial Relations Committee, *The Balfour Declaration on the Status of Dominions* (London, November 15, 1926), 14.

³ *Statute of Westminster 1931* (UK), ss 2 – 6.

⁴ *Australian Statute of Westminster Adoption Act 1942* (Cth), ss 2-6.

⁵ Gabriel Moens' and John Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia: Annotated* (6th ed 2001) 6.

⁶ Keven Booker, Arthur Glass and Robert Watt, *Federal Constitutional Law: An Introduction* (2nd ed 1998), 21-22.

⁷ Patrick Parkinson, *Tradition and Change in Australian Law* (2nd ed, 2001). 128-129. England is also part of the United Kingdom.

As a result, the combined influence of British and US Constitutional theory and practice (and to a lesser extent the ‘semi-federal Constitution of the Dominion of Canada’)⁸ is clearly evident in the arrangement of the Australian Constitution, which adopts certain of the structural features associated with both constitutional models to create a monarchical system that is structured federally.⁹ Thus, the Australian Constitution divides the various powers of the Australian Commonwealth between a federal legislature, executive, and judicature,¹⁰ whilst retaining the British monarch as the notional head of each branch. Chapter I of the Constitution establishes a bicameral federal parliament, comprising the Queen as head, a senate, and a house of representatives. Chapter II formally lodges executive power in the Queen, to be exercised by the Governor-General as her representative, and Chapter III establishes a High Court, which exercises the judicial power of the commonwealth. S 71 states that:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.¹¹

The courts identified in s 71 may be referred to collectively as ‘Ch III courts’, although the ‘other courts’ mentioned (principally State supreme courts) also enjoy a

⁸ Justice Michael McHugh, ‘Tensions Between the Executive and Judiciary’ (2002) 6 *The Judicial Review* 111, 112.

⁹ Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 129; Parkinson, above n 7; Booker, Glass and Watt, above n 6, 18-27.

¹⁰ The Constitution of the United States separates power between the President (Article I, Sec 1), Congress (Article II, Sec 1) and the Supreme Court (Article III, Sec 1).

¹¹ S71 closely resembles Article III, Sec 1 of the US Constitution which provides that the ‘judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish’.

distinct, non-federal role. The implications of this distinction are considered in Chapters 5 and 6.

The separation of powers

The Australian Constitution does not expressly require a separation of governmental powers.¹² Rather, ‘the conclusion that the Constitution embodies a separation of powers is attributed to the terms and structure of the Constitution itself’,¹³ and, in particular, the division of legislative, executive and judicial functions between the first three Chapters of the Constitution.¹⁴ In determining the implications of this division, the High Court has been influenced by British and US constitutional theory.¹⁵ By and large, US constitutional principles (in particular the writings in *The Federalist*)¹⁶ have dominated the High Court’s approach to the separation of judicial power,¹⁷ whereas British parliamentary convention has determined the relationship between executive and legislative power.¹⁸ Arguably the most significant of the British conventions adopted is the system of ‘responsible government’; that is to say, a parliamentary system in which

¹² It is common to attribute the separation of powers doctrine to the writings of the French jurist Charles de Secondat Montesquieu, *The Spirit of Laws* (1748). However, John Locke had previously written an account of the concept in *Two Treatises of Government: In the Former, The False Principles and Foundation of Sir Robert Filmer, And His Followers, are Detected and Overthrown. The Latter is an Essay concerning The True Original, Extent, and End of Civil-Government* (1689).

¹³ Cheryl Saunders, ‘The Separation of Powers’, in Fiona Wheeler and Brian Opeskin, *The Australian Federal Judicial System* (2000) 3, 7.

¹⁴ *New South Wales v Commonwealth* (1915) 20 CLR 54; *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254; Cheryl Saunders, above n 13, 8.

¹⁵ Sir Owen Dixon, ‘The Law and the Constitution’ (1935) 51 *Law Quarterly Review* 590, 597.

¹⁶ Alexander Hamilton, James Madison and John Jay, *The Federalist* (first published 1788).

¹⁷ Booker, Glass and Watt, above n 6, 153.

¹⁸ The most influential exponents of British constitutionalism are arguably Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, (first published 1885, 10th ed 1959) and Sir William Blackstone, *Commentaries on the Laws of England* (first published 1765).

the Crown acts on the advice on its Ministers and, on the other hand, the Ministers are responsible to the Parliament for the actions of the Crown. In the long run the Parliament, comprising the House of Representatives and the Senate, is in a position to control the Executive Government.¹⁹

Responsible government is by definition antithetic to an absolute separation of powers, as it defies a clear separation of executive and legislative functions. For this reason, and in reaction to perceived abuses of legislative power at the hands of their colonial ancestors,²⁰ the doctrine was explicitly repudiated by the framers of the US Constitution,²¹ and executive power was vested specifically in the President.²² This rejection, and the correspondingly dogmatic separation of all three institutional powers in the US, has led commentators to describe the US approach as requiring a ‘strict’ application of the separation of powers doctrine.²³ The British approach, in contrast, has been referred to as encompassing a ‘broad’ power separation.²⁴ The High Court’s approach to the separation of judicial power in Australia, and the influence of US and British constitutional theory in this area, is examined in the second half of this Chapter. At this stage, it is sufficient to note that, in contrast with its acceptance of a broad separation of executive and legislative powers, the High Court has sought to ensure a strict separation of judicial power.²⁵ As a result, the Australian Constitution

¹⁹ *New South Wales v Commonwealth* (1975) 135 CLR 337, 364-365 (Barwick CJ). See also *Brown v West* (1990) 169 CLR 195, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

²⁰ Edward S Corwin, *The Doctrine of Judicial Review* (1914) 20.

²¹ *INS v Chadha*, 462 US 919 (1982) 962 (Powell J).

²² Article 2, s 1 states that the ‘executive Power shall be vested in a President of the United States of America’.

²³ See, for example, Booker, Glass and Watt, above n 6, 155.

²⁴ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 301 (Williams J). See also Booker, Glass and Watt, above n 6, 155; Peter Gerangelos, ‘The Separation of Powers and Legislative Interference with Judicial Functions in Pending Cases’ (2002) 30 *Federal Law Review*, 1.

²⁵ *Huddart, Parker & Co Pty Ltd v Moorhead* (1909) 8 CLR 330; *New South Wales v Commonwealth* (1915) 20 CLR 54; *Waterside Workers’ Federation of Australia v JW Alexander* (1918) 25 CLR 434; *Re Judiciary and Navigation Acts* (1921) 29 CLR 257; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 585 (Dixon and Evatt J); *R v Kirby; Ex parte Boilermakers’ Society of*

has been described as an ‘asymmetric’ constitutional model,²⁶ or a ‘mutation’ of British and American constitutional principles.²⁷

The rule of law

In Chapter 1, it was noted that the relationship between Ch III and rule of law is of particular relevance to the question whether judges can or should mediate, and it is through the application of the separation of powers doctrine that rule of law values are realised.²⁸ The relationship between these concepts has been acknowledged by the High Court since the earliest days of Federation. In *Huddart, Parker & Co Pty Ltd v Moorhead*, for example, Isaacs J approved of Sir William’s Blackstone’s ‘learned’ observation that:

Were it [the judiciary] joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe.²⁹

In *Australian Communist Party v The Commonwealth*, Dixon J provided a powerful endorsement of the view that the Constitution is generally subject to the requirements of the rule of law. In His Honour’s view, the Constitution

Australia (1956) 94 CLR 254; *Thomas v Mowbray* (2007) 233 CLR 307, 426-28 [340]-[344] (Kirby J), 467 [472] (Hayne J).

²⁶ Booker, Glass and Watt, above n 6, 156; Suri Ratnapala, *Australian Constitution Law: Foundations and Theory* (2nd ed, 2007) Ch 5.

²⁷ W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (1976), 125-127.

²⁸ Fiona Wheeler has explained that the separation doctrine ‘serves’ rule of law objectives, ‘and is not an end in itself’. Fiona Wheeler, ‘Due Process, Judicial Power and Chapter III in the new High Court’ (2004) 32 Federal Law Review 205, 209.

²⁹ (1909) 8 CLR 330, 382 (Isaacs J), citing Sir William Blackstone, above n 18, 269.

is an instrument framed in accordance with many traditional conceptions, to some which it gives effect as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.³⁰

Dixon CJ's view is undoubtedly correct.³¹ However, it is one thing to say that the rule of law is a constitutional 'assumption', and quite another to give practical meaning to that concept.³² The values encapsulated within the rule of law cannot be stated with precision. Chief Justice Murray Gleeson has observed extra-curially that even the 'essence' of the rule of law is 'far from precise,'³³ and Ivor Jennings has described the concept as an 'unruly horse', the only purpose of which may be 'distinguishing democratic or constitutional government from dictatorship'.³⁴ Alan Hutchinson and Patrick Monaghan have dubbed the rule of law 'the will-o-the-wisp of constitutional theory,'³⁵ and according to Iain Stewart the concept is 'a juristic chocolate factory, a category with no definite content apart from law itself and hence open to almost any content'.³⁶ Despite these difficulties, Albert Venn Dicey's formulation of the rule of law broadly encompasses its requirements, and the three overlapping elements

³⁰ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

³¹ See, for example: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 69 (Deane and Toohey JJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557; *Plaintiff 157/2002 v Minister for Immigration* (2003) 211 CLR 476, 31 [492], 513-514 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). Other assumptions include federalism and representative government.

³² This is despite the fact that the rule of law has been evolving since (at least) the time of Plato and Aristotle. Freidrich A. Hayek, *The Constitution of Liberty* (1960) 162-175.

³³ Chief Justice Murray Gleeson, 'Courts and the Rule of Law' (speech delivered at Melbourne University, Melbourne, 7 November 2001).

³⁴ Ivor Jennings, *The Law and the Constitution* (first published 1933, 5th ed, 1965) 60.

³⁵ Alan Hutchinson and Patrick Monaghan 'Democracy and the Rule of Law', in Alan Hutchinson and Patrick Monaghan (eds) *The Rule of Law: Ideal or Ideology?* (1987) 97, 99.

³⁶ Iain Stewart, 'Men of Class: Aristotle, Montesquieu and Dicey on "Separation and Powers" and "The Rule of Law"' (2004) 4 *Macquarie Law Journal* 187, 191.

comprising that formulation are sufficiently inclusive for present purposes.³⁷ Denise Meyerson has summarised Dicey's conception of the rule of law as

the need to curb the conferral of discretionary power on government officials
in the interests of certainty and predictability; the ability to seek a remedy in
independent courts ... and the importance of equality before the law.³⁸

As will become clear over the course of the following Chapters, the High Court has sought to satisfy these requirements by constitutionally entrenching certain jurisdictions historically associated with the traditional judicial process, as opposed to regulating the content of the substantive laws as such.³⁹

The States and territories

The third feature of Australia's constitutional landscape, which it is useful to introduce at this stage, is the relationship between the States and territories and Australia's federal system. This highly complex relationship (and the manner and extent to which Ch III limits the functions that may be vested in State and territory courts) is the subject of a more detailed analysis in Chapter 6.

³⁷ In Albert Venn Dicey's words, it 'means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power... Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else. It means, again, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals'. Albert Venn Dicey, above n 18, 202-03.

³⁸ Denise Meyerson, 'The Rule of Law and the Separation of Powers' 4 *Macquarie Law Journal* (2004) 1, 1.

³⁹ *Kruger v Commonwealth* (1997) 190 CLR 1, 44 (Brennan CJ), 63-63 (Dawson J), 142 (McHugh J), 153 (Gummow J); *Leeth v Commonwealth* (1992) 174 CLR 455, 469 (Mason CJ, Dawson and McHugh JJ); *Baker v The Queen* (2004) 223 CLR 513, 533 [45] (McHugh, Gummow, Hayne and Heydon JJ).

Upon the passage of the Commonwealth Constitution the various constitutions in force throughout the Australian colonies were continued 'as at the establishment of the Commonwealth' subject to any conflict with any power vested exclusively in a commonwealth institution by the Commonwealth Constitution.⁴⁰ Section 77 (iii) of the Constitution empowers Parliament to vest federal jurisdiction in any State court, and prior to the creation of the High Court⁴¹ federal judicial power was exercised throughout the newly created Commonwealth entirely by the existing State supreme courts (the so-called 'autochthonous expedient').⁴² Most State courts now exercise a mixture of State and federal judicial power, whereas federal courts are precluded from exercising State judicial power.⁴³

By virtue of s 73 of the Constitution, the States undertook to maintain an avenue of appeal from the supreme courts to the High Court. The territories, in contrast, were not party to the 'federal compact', but rather 'creatures of the Commonwealth ... entirely within the scope of the territories power in s 122 of the Commonwealth Constitution'.⁴⁴ As territory courts could not be vested with federal judicial power they drew instead upon the legal machinery of the States,⁴⁵ and s 122 provided no direct line of appeal from territory courts to the High Court.⁴⁶

⁴⁰ *Commonwealth Constitution* s 106.

⁴¹ *Judiciary Act 1903* (Cth). The first three High Court judges were sworn in on the 6th November 1903. See Chief Justice Murray Gleeson, 'The Centenary of the High Court' (Paper delivered at the 13th AIJA Oration in Judicial Administration, Melbourne, 3 October 2003).

⁴² *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). *Re Wakim, Ex parte McNally* (1999) 198 CLR 511, 540 (Gleeson CJ). This was in direct contrast with the approach adopted in the US, where State courts were never considered suitable for the vesting of federal jurisdiction.

⁴³ Gerard Carney, *The Constitutional Systems of the Australian States and territories* (2006) 341; citing *Re Wakim, Ex parte McNally* (1999) 198 CLR 511.

⁴⁴ *Ibid* 1.

⁴⁵ Carney, above n 43, 1.

⁴⁶ In *Porter v The King; Ex Parte Yee* (1926) 37 CLR 432, the High Court held that an avenue of appeal could nevertheless be granted by Parliament to the High Court under s 122. See also *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.

Most of the Australian colonies had developed a system of responsible government prior to federation,⁴⁷ and the principles governing the division of legislative and executive powers were therefore broadly comparable at the State and federal level. At no point, however, had any of the States derived a strict separation of judicial power from their colonial Constitutions; a situation unchanged by the passage of the Commonwealth Constitution.⁴⁸ In recent years, the High Court has made in-roads into the autonomy previously enjoyed by the States, by asserting the need to maintain the integrity of Australia's 'integrated ... judicial system'.⁴⁹ One consequence of this "radical" addition to the body of Australian constitutional law,⁵⁰ is that certain of the implications drawn from Chapter III may now also apply to the courts of the States. The High Court has also extended the boundaries of Australia's integrated judiciary to include the courts of the territories,⁵¹ thereby securing an avenue of appeal from (and a degree of control over) the courts of the territories. The manner and extent to which this capacity has been exercised is the subject of Chapter 6.

⁴⁷ Booker, Glass and Watt, above n 6, 13-14. Gerard Carney, *The Constitutional Systems of the Australian States and territories*, above n 43, 341.

⁴⁸ Gerard Carney, 'Wilson & Kable: The Doctrine of Incompatibility – An Alternative to Separation of Powers?' (1997) 13 *Queensland University of Technology Law Journal* 175, 183; citing NSW: *Clyne v East* (1967) 68 SR(NSW) 385, 395, 400; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381, 407, 410, 419-420. Victoria: *Collingwood v Victoria (No 2)* [1994] 1 VR 652. South Australia: *Gilbertson v South Australia* (1976) 15 SASR 66, 85; *Grace Bible Church v Reedman* (1984) 36 SASR 376. Western Australia: *JD & WG Nicholas v Western Australia* [1972] WAR 168. See also John Alvey, 'The Lack of Separation of Powers in Queensland' (2006) 9 *Public Administration Today* 64; Justice David Malcolm, 'The Judiciary Under the Constitution: The Future of Reform' (2003) 31(2) *Western Australian Law Review* 129.

⁴⁹ *Kable v DPP (NSW)* (1996) 189 CLR 51, 102 (Gaudron J), 114 (McHugh J), 137 (Gummow J).

⁵⁰ Fiona Wheeler, 'The Kable doctrine and State Legislative Power Over State Courts' (2005) *Australasian Parliamentary Review* 15, 21; citing Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989 – 2004 (Inaugural Sir Anthony Mason Lecture in Constitutional Law, Sydney, 26th November 2004) 7.

⁵¹ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

Private dispute resolution and supervisory jurisdiction

Just as the High Court's appellate jurisdiction is essential to the integrity of Australia's judicial system, so too is the assurance of a supervisory jurisdiction in respect of private dispute resolution processes essential to the performance of the judiciary's governmental obligations. Common law countries have accommodated ADR mechanisms at the periphery of the formal court system for years. Arbitration was one of the earliest ADR process to be integrated with the formal justice system. More recently, various non-determinative ADR processes such as mediation have been annexed to the courts. By ensuring judicial supervision of and control over these processes, lawmakers (parliamentary and judicial) have secured to the courts the power to manage their growth and development by way of appeal, remittal or review (in the case of arbitration) or by stemming or increasing the flow of referrals (in the case of court-connected processes). Court-connected processes are examined in Chapter 7.

For the purposes of this thesis, an important conceptual distinction should be drawn between private and international arbitration, on the one hand, and the various quasi-judicial tribunals established by statute, on the other.⁵² This is because private and international arbitration have the potential to dilute judicial power by drawing the power to determine legal disputes into the private or international sectors, whereas

⁵² Statutory arbitral tribunals have a long history in Australia. The *Commonwealth Conciliation and Arbitration Act 1904* purported to establish a quasi-judicial Commonwealth Court of Conciliation and Arbitration. Isaacs J expressed the view that the Commonwealth Court of Conciliation and Arbitration was so fundamental to the Australian justice system that it was 'conspicuously on the face of the Constitution, the third party to every significant industrial dispute'. (*R v Commonwealth Court of Conciliation and Arbitration; Ex parte Merchant Service Guild* (1913) 15 CLR 586, 609-610 (Isaacs J)). International arbitrations are subject to the *International Arbitration Act 1974*, which adopts the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

quasi-judicial tribunals threaten to usurp judicial power by transferring that power to other (non-judicial) governmental bodies. The High Court's approach to the latter mode of arbitration is considered in the second half of this Chapter.

Arbitration is far older than the common law,⁵³ and is historically integral to the provision of civil justice in England;⁵⁴ especially in commercial matters.⁵⁵ The first Act of Parliament governing the arbitral process in England was the English *Arbitration Act 1697*,⁵⁶ which codified various aspects of the common law and established a statutory supervisory jurisdiction.⁵⁷ The English *Act* was adopted by the various Australian colonies at the time of settlement, and together with the relevant rules and principles of English common law forms the basis of Australia's arbitration system.⁵⁸ The current Australian framework comprises a series of *Uniform*

⁵³ In contrast, non-determinative processes such as mediation are historically an 'integral feature' of the cultural tradition in certain Asian, religious and traditional societies, Veronica Taylor and Michael Pryles, 'The Cultures of Dispute Resolution in Asia' in Michael Pryles (ed), *Dispute Resolution in Asia* (1997); Bee Chen Goh, *Law without Lawyers, Justice without Courts: On Traditional Chinese Mediation* (2002); Laurence Boulle, *Mediation: Principles Process Practice* (2005), 50.

⁵⁴ The first known record of arbitration in England is contained in a letter to King Alfred's son, Edward the Elder, in AD920. The 'Fonthill Letter' dates from the year AD 920 to King Alfred's son, Edward the Elder, from an official appointed by the King as an arbiter. However, arbiters were probably employed for some time before this. In ancient Rome, a wide range of disputes were handled by arbiters resulting in binding arbitration agreements ('*compromissum*'). A similar system is likely to have been applied in Roman Britain. Derek Roebuck, *Early English Arbitration* (2008), 48, 60, 137.

⁵⁵ Peter Behrens, 'Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits', in Daniel Friedman and Ernst-Joachim Mestmacker (eds), *Conflict Resolution in International Trade: A Symposium* (1993). Private arbitration has since flourished in the areas of labour relations/employment disputes and international commerce, where arbitration remains 'a preferred form of dispute resolution'. Tania Sourdin, *Alternative Dispute Resolution* (2005) 37.

⁵⁶ The earliest English judgment to mention arbitration is *Vynior's Case* (1610) 8 Co Rep 80.

⁵⁷ However, prior to the passage of the *Arbitration Act* in 1996 the common law remained the primary source of arbitration law in England (Michael Mustill and Stewart Boyd, *Commercial Arbitration* (1989), 53). According to Robert Merkin, the 1697 Act is 'the closest thing to a definitive code of arbitration law which has ever been enacted in England'. Robert Merkin, *Arbitration Act 1996 An Annotated Guide* (1996), 1. The 1996 Act reflects many of the provisions of the Model Law developed by the United Nations Commission on International Trade Law (UNCITRAL). Other countries have adopted the Model Law in its entirety. See, for example, *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990*.

⁵⁸ Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*, (2nd ed, 2002) 299-301. Despite its origins in English law, however, the current statutory framework for commercial arbitration in Australia differs from the English framework. Significantly (and in contrast with the revised English system), Australia's domestic arbitration laws have not been designed to mirror the UNCITRAL Model Law.

Commercial Arbitration Acts established by the States and territories.⁵⁹ For reasons that will become apparent, however, it is important to acknowledge that the *Uniform Commercial Arbitration Acts* embody principles developed at common law.

Given the ancient origins of arbitration, and its historic popularity in certain fields of dispute resolution, it is unsurprising that formal legal systems have seen a need to assert their sovereignty over arbitration in matters of public adjudication. As Scrutton LJ remarked, there ‘must be no Alsatia in England where the King’s writ does not run’.⁶⁰ Were arbitration agreements capable of ousting the jurisdiction of the courts this sovereignty would be jeopardised. For this reason, the courts necessarily exercise ‘a supervisory jurisdiction [in respect of private arbitration] by allowing appeals to be brought in a limited class of case’.⁶¹

Judicial power in respect of arbitration is nevertheless restricted to a limited range of functions,⁶² reflecting the fact that the relationship between arbitration and the judicial

⁵⁹ *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration Act 1986* (ACT); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1990* (Qld). The Uniform Acts (which, while similar, are not in fact identical) resulted from a series of Law Reform Commission reports and a uniform Bill prepared by the Standing Committee of Attorneys-General in 1984. See, for example; Law Reform Commission of Western Australia, *Commercial Arbitration and Commercial Causes*, Project No 18, (1974); Law Reform Commission of NSW, *Report on Commercial Arbitration*, LRC 27 (1976). None of the Uniform Acts define the scope of the term ‘commercial arbitration’, and uncertainties remain as to whether certain disputes are properly to be considered ‘commercial’. Generally speaking a domestic dispute which is referred to an arbitrator by private agreement will be subject to the provisions of the Uniform Acts (John Sharkey and John Dorter, *Commercial Arbitration* (1986), 11), although the Uniform Acts do not apply to family or neighbourhood disputes (Astor and Chinkin, above n 58, 302).

⁶⁰ *Czarnikow v Roth, Schmidt and Co* [1922] 2 KB 478.

⁶¹ Ronald Bernstein, *Handbook on Arbitration Practice* (1987) 15. However, clauses which state that an arbitral award is a condition precedent to litigation are valid: *Scott v Avery* [1856] 5 HL Case 811.

⁶² Ronald Bernstein identifies five ways in which the English Courts assist the arbitral process: by exercising the power to stay proceedings, by appointing arbitrators, by assisting with the conduct of a reference, by enforcing arbitral awards, and by exercising a supervisory jurisdiction (Bernstein, above n 61, 14-15).

system has been ‘dominated by the law of contract’.⁶³ Arbitration is invoked by the private agreement of the parties (the ‘arbitration agreement’), either at the time of contract or in respect of an existing dispute, and the general sentiment of judicial opinion in common law countries has been that ‘the courts have acted quite rightly in requiring good reason to be shown why this part of a contract should not be strictly performed’.⁶⁴ While the general approach to the supervision of arbitration reflects a private rights model, however, the remit of that supervisory jurisdiction is not the same throughout the common law world. Certain countries (such as Australia and England) have demonstrated a relatively paternalistic attitude towards the supervision of arbitration, whereas the approach in other countries (most notably the US) has been characteristically laissez-faire in nature.

These differences are most apparent in the extent to which the courts will intervene to correct legal error. In England and Australia, a distinction is drawn between substantive errors in fact and in law. A supervising court will generally have no jurisdiction to review an arbitrator’s findings on the basis that he/she has erred in fact. An error in law, on the other hand, may be reviewable by a supervising court in certain circumstances. Thus, the *Uniform Commercial Arbitration Acts* require that arbitrators provide reasons for their decisions, and grant the supreme courts of the States a limited power of review on points of law.⁶⁵ The rationale for this distinction

⁶³ Michael Mustill and Stewart Boyd state that ‘those who devise a law or arbitration may choose between two alternative views of the relationship. First, they may regard arbitration as an aspect of public law. The arbitrator is a delegate of judicial powers which are essentially the property of the State ... Alternatively, the legal system may treat arbitration as a branch of private law [in which] the mutual obligations of the parties in relation to the conduct of the reference, are created and regulated by the private bargain between the parties, and are no concern of the State’. Above n 57, 4.

⁶⁴ *Bristol Corporation v John Aird & Co* [1913] AC 241 (Lord Moulton). See also *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253, 257-258 (Barwick CJ).

⁶⁵ *Commercial Arbitration Act 1984* (NSW), ss 29, 38; *Commercial Arbitration Act 1984* (Vic), ss 29, 38; *Commercial Arbitration Act 1985* (NT), ss 29, 38; *Commercial Arbitration Act 1985* (WA), ss 29, 38; *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA), ss 29, 38; *Commercial*

is that, whereas disputants should be bound by an agreement to have an arbiter determine the facts in dispute, if no recourse to the courts were available for an error in law an arbitrator would be free to give effect to his/her notions of justice or of what the law ought to be.⁶⁶ The threat posed by this possibility to the exclusive vesting of judicial power in Ch III courts is patent.

In contrast, US arbitrators are generally free to make decisions in accordance with their own sense of law and equity.⁶⁷ Moreover, the American Arbitration Association ‘actively discourages’ arbitrators from writing detailed reasons for their decisions – further limiting the opportunity for judicial interference with an arbitral award.⁶⁸ According to John Murray, Alan Rau and Edward Sherman, ‘the tactic of ensuring the finality of arbitration by harnessing Delphic decisions to a hard-to-rebut presumption of validity has been extremely effective’.⁶⁹ As a result, the boundaries of substantive

Arbitration Act 1986 (ACT), ss29, 38; *Commercial Arbitration Act 1986* (Tas), ss 29, 38; *Commercial Arbitration Act 1990* (Qld), ss 29, 39.

⁶⁶ Mustill and Boyd, above n 57, 27. Previously, in England, appeals on points of law were only available when apparent on the face of the award. As there was no general requirement for an arbiter to issue reasons for his/her decision, this reduced the opportunity for courts to intervene on substantive grounds. Section 52 of the *Arbitration Act 1996* (England and Wales), however, provides that arbiters must provide reasons for their decisions (unless the parties agree otherwise). Section 69 of the Act also provides the court with the power to review an arbitral decision on a point of law, at its own leave, in certain circumstances. In the US, by way of contrast, the courts have repeatedly emphasised that they have no general jurisdiction to correct substantive errors; either in law or in fact. In *United Paperworkers v Misco, Inc.*, 484 US 29 (1987), the Supreme Court explained that courts, ‘do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts’. Justice White also stated, at 36, that ‘the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award, even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract’. See also; *Hill v Norfolk and Western Railway Co*, 814 F2d 1192, 1194-1195 (7th Circuit 1987), where Judge Posner stated that: ‘As we have said too many times to want to repeat again, the question for decision by a federal court asked to set aside an arbitration award – whether that award is made under the Railway Labour Act, the Taft Hartley Act, or the United States Arbitration Act – is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract’. See also: *Steelworkers v American Manufacturing Co*, 363 US 564, 567 – 568 (1960).

⁶⁷ *In the Matter of the Arbitration between Silverman and Benmore Coats, Inc.*, 461 NE 2d 1261, 1266 (NY 1984); *Marsch v Williams*, 28 Cal Rptr 2d 402 (Cal Ct App 1994).

⁶⁸ John Murray, Alan Rau and Edward Sherman, *Arbitration* (1996) 15.

⁶⁹ Murray, Rau and Sherman, above n 68.

arbitral discretion have not been controlled and limited in the US to the extent that they have been in England and Australia.

While English and Australian arbiters must generally ‘apply the law’, however, this does not extend to a duty to follow ‘judicial’ rules of procedure.⁷⁰ Arbitral procedure is governed by the arbitration agreement (which may incorporate the arbitral rules of certain associations)⁷¹ and the requirements of procedural fairness.⁷² Unless an arbitrator fails to accord with these requirements, the courts have no jurisdiction to review the process by which an arbitral decision has been made. As discussed in greater detail in Chapter 4, however, the requirements of procedural fairness are not fixed, and will vary depending upon ‘the nature of the jurisdiction or power exercised and the statutory provisions [if any] governing its exercise’.⁷³ Moreover, while arbiters must act in accordance with procedural fairness the practical implications of that concept are not the same as they are for judges, and the requirements of procedural fairness will differ between arbitrations. As Michael Mustill and Stewart Boyd have explained:

[T]here is a ... wide variety in the procedures which courts have treated as acceptable. At the one extreme can be found a procedure which is virtually indistinguishable from that which would be followed in a High Court action. At the other is a procedure involving a degree of abbreviation and

⁷⁰ Mustill and Boyd, above n 57, 70.

⁷¹ For example, the Institute of Arbitrators and Mediators (IAMI) operate two procedures that may be specified in the Arbitration Agreement; The IAMA Arbitration Rules and the IAMA Fast Track Arbitration Rules. (IAMA, *The IAMA Rules Incorporating the IAMA Fast Track Rules* (2007)).

⁷² Bernstein, above n 61, 39.

⁷³ *National Companies and Securities Commission v News Corporation* (1984) 156 CLR 296, 314 (Gibbs CJ).

informality wholly repugnant to all the principles on which an English trial is conducted.⁷⁴

Judicial acceptance of otherwise ‘repugnant’ procedures reinforces the private nature of arbitration and supports the view that contracting parties should be free to settle their disputes according to the terms of their own bargain. It also reflects the historically specialist nature of arbitration, and acknowledges that the success of arbitration rests, in part, upon disputant confidence in the arbitrators understanding of the issues presented.⁷⁵ As a result, a breach of procedural fairness will rarely be established in an arbitral context,⁷⁶ and it is even less likely to result in the remittal of an arbitral award.⁷⁷ Nevertheless, the supervisory jurisdiction of the courts over arbitration in procedural matters remains an essential feature of the civil justice framework. By retaining the power to sanction inappropriate conduct the judiciary has protected the integrity of its governmental role, and the mere existence of this jurisdiction is likely to limit the worst excesses of procedural impropriety (as arbitrators will seek to avoid the stigma of judicial rebuke). In Chapter 6, it is suggested that similar imperatives may underpin the High Court’s approach to States and territory courts, and that this may explain the apparent failure of the *Kable* doctrine.

⁷⁴ Mustill and Boyd, above n 57, 16.

⁷⁵ From a US perspective, Lon Fuller has observed that an ‘arbitrator will frequently interrupt the examination of witnesses with a request that the parties educate him to the point where he can understand the testimony being received. This education can proceed informally, with frequent interruptions by the arbitrator, and by informed persons on either side, when a point needs clarification ... There is in this informal procedure no infringement whatever of arbitral due process. On the contrary, the party’s chance to have his case understood by the arbitrator is seriously impaired if his representative has to talk into a vacuum, if he addresses his words to uncomprehending ears’. Lon Fuller, ‘Collective Bargaining and the Arbitrator’ (1963) *Wisconsin Law Review* 3, 12.

⁷⁶ Mustill and Boyd, above n 57, 254.

⁷⁷ *Ibid.*

The preceding analysis demonstrates that the rule of law lies at the heart of the Australian Constitution, that the High Court is functionally charged with maintaining it, and that the performance of this function involves the maintenance of three essential (and overlapping) jurisdictions:

1. Exclusive jurisdiction (which insulates judicial power from usurpation by quasi-judicial bodies).
2. Appellate jurisdiction (which ensures a direct line of appeal to the High Court from all Australian courts).
3. Supervisory jurisdiction (which provides the judiciary – and ultimately the High Court – with ultimate control over private forms of dispute resolution).

The first two of these jurisdictions are considered, and their relevance to the development of judicial mediation illustrated, in the following Chapters. The remainder of this Chapter focuses on the separation doctrine and the maintenance of the judiciary's exclusive jurisdiction, and a fourth and final jurisdiction ('inherent' jurisdiction) is identified as a possible rationale for the second limb of that doctrine. Attention is drawn to the incompatibility doctrine where relevant.

The 'Separation Doctrine'

Because 71 of the Constitution vests 'judicial power' (and only judicial power) in Ch III courts, the definition of that concept is pivotal to the question whether judges may mediate in Ch III courts. Ch III does not define judicial power, hence the precise

scope and meaning of the concept has fallen to the High Court to interpret.⁷⁸ In the performance of this task the High Court has developed (and subsequently been guided by) two fundamental principles stemming from the textual arrangement of the Constitution and the influences and assumptions set out in the previous section. The first principle is that judicial power cannot be conferred on bodies other than courts within the meaning of s71. The second principle is that ‘power which is not within [judicial power] or incidental thereto cannot be conferred on a federal court or on a State court exercising Federal jurisdiction’.⁷⁹

These two principles (or ‘limbs’) may be referred to collectively as the ‘separation doctrine’,⁸⁰ and encapsulate the cumulative outcome of a series of High Court cases, beginning with *Huddart, Parker & Co Pty Ltd v Moorhead* (*‘Huddart v Parker’*),⁸¹ and culminating in *R v Kirby; Ex parte Boilermakers’ Society of Australia* (the *‘Boilermakers’ Case’*).⁸² Despite the relative age of the *Boilermakers’ Case* it remains the principal Australian authority on ‘the place of the judicial power in the application of the doctrine of separation of powers in a federation’,⁸³ and represents a convenient point of origin for the analysis of a number of overlapping streams of High Court precedent.⁸⁴

⁷⁸ Leslie Zines, *The High Court and the Constitution* (5th ed 2008), 219.

⁷⁹ For an introduction to the High Court’s performance of this task see, for example: Zines, above n 78; Ratnapala above n 26, 122; Booker, Glass and Watt, above n 6, 153.

⁸⁰ This term is adopted by Fiona Wheeler in her various commentaries on the topic, including: Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’ (1997) 23(2) *Monash University Law Review* 248; Fiona Wheeler, ‘Due Process, Judicial Power and Chapter III in the new High Court’, above n 28.

⁸¹ (1909) 8 CLR 330.

⁸² (1956) 94 CLR 254.

⁸³ Booker, Glass and Watt, above n 6, 154.

⁸⁴ In *Thomas v Mowbray* (2007) 233 CLR 307, the Commonwealth argued that the High Court’s development of the ‘chameleon doctrine’ (discussed in Chapter 3) meant that the rule in the *Boilermakers’ Case* did ‘not matter much anymore’. This argument was firmly rejected by Kirby J (426-428 [340]-[344]) and Hayne J (467 [472]). In Hayne J’s view, whatever ‘the ambit of the so-called chameleon doctrine, by which a power that may be exercised administratively or judicially may take its colour from the body to which it is given, the doctrine does not strip the concept of separation

The following section describes the evolution of the separation doctrine, and further develops the relationship between that doctrine and the rule law. The incompatibility doctrine is also introduced at this stage, as the seeds of this alternative approach to the second limb of the separation doctrine were sown during this period. Although the incompatibility doctrine failed to gain majority support vis-à-vis the exercise of federal judicial power, notions of incompatibility have since been revived in the context of the *persona designata* exception (allowing the vesting of certain non-judicial functions in federal judges acting in their private capacity),⁸⁵ and the *Kable* doctrine (limiting the functions that may be vested in State or territory courts).⁸⁶ The implications of the incompatibility doctrine for judicial mediation (and its application in these discrete contexts) are considered in Chapters 5 and 6.

Only Chapter III Courts may exercise judicial power (the ‘first limb’)

At first glance, the relevance of the first limb of the separation doctrine to the development of judicial mediation is less obvious than the second limb, as it does not directly limit the functions that may be vested in Ch III courts. However, the first limb provides one possible foundation for the ‘judicial process’ implication and, as explained in greater detail in Chapter 4, this implication is highly relevant to the development of judicial mediation. On a more fundamental level, the first limb also operates to ensure the exclusive jurisdiction of the federal judiciary which, as noted

of powers of all meaning. Contrary to the submissions of the Commonwealth, the chameleon doctrine does not mean that *Boilermakers*’ “does not matter much any more.” There remains a real and radical difference between the judicial power of the Commonwealth and executive and legislative power’. The chameleon doctrine is examined in Chapter 3.

⁸⁵ *Kable v DPP (NSW)* (1996) 189 CLR 51.

⁸⁶ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

above, is as an essential condition for maintaining the rule of law. In contrast, the second limb of the separation doctrine does not directly serve any of the three essential jurisdictions outlined above. Rather, the second limb seeks to further the object of the first limb – the maintenance of judicial independence and impartiality⁸⁷ – by protecting certain aspects of inherent jurisdiction. The second limb is considered in more detail later in this section.

The principle that ‘parliament has no power to entrust the exercise of the judicial power to any other hands’ than ‘courts in the strict sense of the term’ was initially identified by Griffith CJ in *Huddart v Parker*,⁸⁸ but it is *New South Wales v Commonwealth* (the ‘*Wheat Case*’)⁸⁹ which serves as the most clear illustration of the importance attached to the ‘first limb’ of the separation doctrine by the High Court.⁹⁰ The *Wheat Case* revolved around the creation of an ‘Inter-State Commission’ as required by sections 101 to 104 of the Constitution, which, according to s101, was to be granted;

such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

The Commission was created by the *Inter-State Commission Act 1912* (Cth) which granted the Commission ‘judicial powers’ to carry out its constitutional mandate. As a

⁸⁷ Booker, Glass and Watt, above n 6, 152.

⁸⁸ (1909) 8 CLR 330, 355.

⁸⁹ (1915) 20 CLR 54.

⁹⁰ Zines, above n 78, 208.

preliminary issue, a majority of the High Court considered that the administrative structure of the Commission was such that it could not be considered a federal court for the purposes of s71.⁹¹ In particular, their Honours held that the terms of tenure set out for Commissioners in s 103 were irreconcilable with the provisions of tenure set out for federal judges in s72.⁹² The issue before the Court, therefore, was whether the discretion to vest in the Commission, ‘such powers of adjudication and administration as the Parliament deems necessary’, could include the vesting of federal judicial power in a court which did not satisfy the tenure requirements of s72. The majority held that it could not. In Griffith CJ’s view, ‘the provisions of s71 are complete and exclusive, and there cannot be a third class of Courts which are neither Federal Courts or State Courts invested with Federal jurisdiction’.⁹³ Similarly, according to Isaacs J:

Chapter III is headed ‘The Judicature’, and vests the judicial power of the Commonwealth not in the Sovereign simply, or as he may in Parliament direct, but in specific organs, namely, Courts strictly called. They are the High Court, such other federal courts as Parliament creates, and such other Courts as it invests with Federal jurisdiction. There is a mandate to create a High Court; there is a discretionary power to create other federal courts; and there is a discretionary power to invest with Federal jurisdiction such State Courts as Parliament finds already in existence, that is, State Courts. But that exhausts the judiciary ... It would require, in view of the careful delimitation I have mentioned, in my opinion, very

⁹¹ (1915) 20 CLR 54, 62 (Griffith CJ), 89-90 (Isaacs J), 106-107 (Powers J); 109-110 (Rich J).

⁹² Ibid 61-62 (Griffith CJ), 93 (Isaacs J), 107 (Powers J), 109 (Rich J). S103 provides that Commissioners are to be appointed for a period of seven years unless removed by a vote of both Houses of the Parliament. S72 provides that Federal Court judges are to be appointed for life.

⁹³ (1915) 20 CLR 54, 62.

explicit and unmistakable words to undo the effect of the dominant principle of demarcation.⁹⁴

Although the majority judgment in the *Wheat Case* was couched in terms of the form and drafting of the Constitution, it is apparent that their Honours' were principally concerned with the need to ensure the isolation of judicial power so as to prevent its usurpation by quasi-judicial bodies at the direction of Parliament (thereby ensuring the exclusive jurisdiction of the judiciary and furthering the rule of law).⁹⁵ As Fiona Wheeler has observed:

[T]he first limb of the separation doctrine specifically promotes the independent and impartial exercise of judicial power by directing such power away from the legislative and executive branches to 'courts' (s71) including 'federal courts' whose judges cannot be arbitrarily removed from office.⁹⁶

Thus, a primary object of the first limb of the separation doctrine is to further the second of the broad rule of law values (or elements) identified in the first part of this Chapter; that is to say, 'the ability to seek a remedy in independent courts'.⁹⁷ The first element (curbing 'the conferral of discretionary power on government officials')⁹⁸ is

⁹⁴ (1915) 20 CLR 54, 89-90.

⁹⁵ *New South Wales v Commonwealth* (1915) 20 CLR 54, 93 – 94. Isaacs J was particularly concerned that, if vested with s71 judicial power, the Commission could try criminal cases without appeal on the merits to the High Court. His Honour was also concerned that as there is no requirement that members of the Commission be legally qualified, laymen could notionally overrule a State Court and perhaps even the High Court on the facts. John Finnis has argued that this concern ignores the fact that Federal Court judges are not required by the Constitution to have any legal training. 'Separation of Powers in the Australian Constitution' (1968) 3 *Adelaide Law Review* 159. However, as Leslie Zines points out, it is 'far more likely that there would be laymen as members of the Commission than as members of a Federal Court'. Zines, above n 78, 211.

⁹⁶ Wheeler, 'Due Process, Judicial Power and Chapter III in the High Court', above n 28, 208; citing Fiona Wheeler, 'The *Boilermakers Case*', in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003), 166.

⁹⁷ Meyerson, above n 38, 1.

⁹⁸ *Ibid.*

made possible by the realisation of the first, whereas the third element ('equality before the law')⁹⁹ is not protected in Australia.¹⁰⁰

The first limb of the separation doctrine was reaffirmed three years later in *Waterside Workers' Federation of Australia v JW Alexander* ('*Alexander's Case*'),¹⁰¹ where it fell to the High Court to consider whether the Commonwealth Court of Conciliation and Arbitration (the 'Arbitration Court') could make orders penalising the failure to honour industrial awards. Applying the *Wheat Case*, the majority in *Alexander's Case* held that the Arbitration Court did not constitute a Federal Court as s 12 of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) provided that the appointment of the President to that Court was for a renewable period of seven years, and not for life as required for Ch III judges by s 72.¹⁰² Once again, compliance with the requirements of s72 was deemed essential according to Isaacs J (this time joined by Rich J), as the 'independence of the tribunal would be seriously weakened if the Commonwealth Parliament could fix any less permanent tenure than for life'.¹⁰³ Thus, the Arbitration Court could not be validly vested with the power to enforce its own orders.

In addition to restating that Ch III courts must satisfy the tenure requirements for judges set out in s 72, three of the majority judges also considered whether the primary function of the Arbitration Court excluded the co-vesting in that Court of federal judicial power. While strictly speaking these comments were *obiter*, they were

⁹⁹ Meyerson, above n 38, 1.

¹⁰⁰ *Kruger v Commonwealth* (1997) 190 CLR 1, 44 (Brennan CJ), 63-63 (Dawson J), 142 (McHugh J), 153 (Gummow J); *Leeth v Commonwealth* (1992) 174 CLR 455, 469 (Mason CJ, Dawson and McHugh JJ); *Baker v The Queen* (2004) 223 CLR 513, 533 [45] (McHugh, Gummow, Hayne and Heydon JJ).

¹⁰¹ (1918) 25 CLR 434.

¹⁰² *Ibid* 461 (Barton J), 469-470 (Isaacs and Rich JJ), 488 (Powers J).

¹⁰³ *Ibid* 469 (Isaacs and Rich JJ).

later adopted by the majority in the *Boilermakers' Case* in justification of the second limb.¹⁰⁴ Powers J believed that 'a compulsory arbitration Court is not a Court to settle existing rights between parties. Its powers are more legislative than judicial'.¹⁰⁵ Isaacs and Rich JJ stated that arbitral functions could not be considered judicial as:

The two functions [*arbitral and judicial*] ... are quite distinct. The arbitral function is ancillary to the legislative function, and provides the *factum* upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law. Not only are they different powers, but they spring from different sources in the Constitution. The Arbitral power arises under sec 51 (xxxv); the judicial power under sec 71.¹⁰⁶

Thus, Isaacs and Rich JJ were of the view that the Arbitration Court was not a Ch III court because arbitral decisions are not made by reference to existing rights, and because the Constitution had specifically assigned the 'arbitral power' to Parliament. Even if the Arbitration Court had satisfied the tenure requirements set out in s 72, therefore, it would have been beyond Parliament's legislative power to vest Ch III judicial power in that Court by virtue of the first limb.

The fact that arbitration and mediation are both commonly classified as forms of ADR might lead the casual observer to assume that the rule in *Alexander's Case* prohibits judicial mediation. Such an assumption would be flawed for a number of reasons.

¹⁰⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 281 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁰⁵ *Waterside Workers' Federation of Australia v JW Alexander* (1918) 25 CLR 434, 485.

¹⁰⁶ *Ibid* 464-465.

Most importantly, as pointed out in Chapter 1, mediation does not affect pre-existing rights.¹⁰⁷ Mediation is by definition non-determinative, thus the distinction drawn by Isaacs and Rich JJ between arbitration and judicial decision-making simply has no application. Even insofar as arbitration is concerned, however, their Honours conclusions must be qualified in two respects.

First of all, the ‘arbitral power’ to which Isaacs and Rich JJ referred is the power to make laws in respect of industrial conciliation and arbitration under s 51 (xxxv) of the Constitution. The scope of this power is limited to arbitration ‘for the prevention and settlement of industrial disputes extending beyond the limits of any one of the States’. The Constitution says nothing of other forms of arbitration. Thus, s 51 (xxxv) would not (in isolation) prevent the vesting of federal judicial power in courts established for the purpose of engaging in arbitration in any other circumstances; say, for example, under one of the *Uniform Commercial Arbitration Acts*.¹⁰⁸

Second of all, Isaac and Rich JJ’s conclusion that arbitration is inherently legislative in nature (because it involves a determination of new rights) cannot be reframed as a prohibition on the vesting of arbitral functions in Ch III courts. While it is true that the arbitral function is also non-judicial in nature (because the existence of pre-existing rights is an essential element of judicial power),¹⁰⁹ the first limb only prevents the vesting of exclusively judicial functions in non-judicial bodies; it does not prevent the vesting of non-judicial functions in Ch III courts (the second limb). While this may be a rational extension of their Honours reasoning (and an extension made by the High

¹⁰⁷ Simon Roberts, ‘Mediation in Family Disputes’ (1986) 46 *Modern Law Review* 537, 546; NADRAC, *Alternative Dispute Resolution Definitions* (1997), 5; Boulle, above n 53, 65; Sourdin, *Alternative Dispute Resolution*, above n 55, 26.

¹⁰⁸ These Acts are referred to in the first part of this Chapter.

¹⁰⁹ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

Court and the Privy Council in the *Boilermakers' Case*), Isaacs, Rich and Powers JJ stopped short of recognising any such requirement. Thus, the rule in *Alexander's Case* is confined to the less restrictive proposition that 'the judicial power of the Commonwealth may be vested only in a court, such a court being one whose primary function or functions are judicial in character'¹¹⁰ (or as Isaacs J put it in the *Wheat Case*, courts 'strictly called').¹¹¹

In any event, Parliament's direct response to *Alexander's Case* did not reflect any distinction between judicial and non-judicial functions. Instead, amendments to the *Conciliation and Arbitration Act* were passed in 1926 restoring the enforcement powers of the Court.¹¹² The validity of this restoration was premised on structural changes to the Arbitration Court, and in particular the appointment of three 'Judges' and a 'Chief Judge' – all of whom would be appointed for life. A series of cases followed in which the High Court either accepted the valid constitution of the Arbitration Court,¹¹³ or considered that the implications of the distinction drawn by Isaacs, Rich and Powers JJ between arbitral and judicial functions remained uncertain and did not require consideration.¹¹⁴ Of course, any such ruling would have had far reaching consequences, as the constitutionality or otherwise of the Arbitration Court was merely a prelude to the broader constitutional issue of whether or not a single body could be endowed with judicial and non-judicial functions. The overwhelming

¹¹⁰ Ratnapala, above n 26, 150.

¹¹¹ (1915) 20 CLR 54, 93.

¹¹² *Conciliation and Arbitration Act 1926* (Cth).

¹¹³ See, for example, *R v Taylor; Ex parte Roach* (1951) 82 CLR 587.

¹¹⁴ In *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138, the majority stated that, whether 'and how far judicial and arbitral functions may be mixed up is another question, one which fortunately the Court has never been called upon to examine', at 155 (Dixon, Fullagar and Kitto JJ). The answer to the same question was also avoided in a unanimous decision in *R v Wright; Ex parte Waterside Workers' Federation of Australia* (1955) 93 CLR 528, 542 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto, and Taylor JJ).

impression from High Court precedent at this time was that it could not,¹¹⁵ but a small number of pronouncements suggested that it could. In *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* ('*Dignan*') for example, Evatt J stated that the Arbitration Court has

for some years performed functions which are not the exercise of judicial power at all ... The exercise of 'arbitral' functions in relation to industrial disputes is lawful because the Commonwealth Parliament has made a valid law in the exercise of its power under sec. 51 (xxxv.) of the Constitution.¹¹⁶

Similarly, in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* ('*Lowenstein*'),¹¹⁷ a majority of the High Court held that s 217 of the *Bankruptcy Act 1924 – 1933* (Cth) validly conferred both judicial and non-judicial functions on the Bankruptcy Court. The objection raised by the appellant was that s 27 allowed the Court, 'both to charge a prisoner with an offence and then itself to prosecute and try him for the offence with which the court has already charged him'.¹¹⁸ Such a combination of functions, it was argued, allowed the Court to be litigant and judge at the same time.¹¹⁹ In Latham's CJ opinion, however;

It is not possible to rely upon any doctrine of absolute separation of powers for the purpose of establishing a universal proposition that no court or person who discharges Federal judicial functions can lawfully

¹¹⁵ See, for example, *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 585 (Dixon and Evatt JJ).

¹¹⁶ (1931) 46 CLR 73, 116-117.

¹¹⁷ (1938) 59 CLR 556 (Latham CJ, Rich, Starke and McTeirnan JJ; Dixon and Evatt JJ in dissent).

¹¹⁸ *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 564 (Latham CJ).

¹¹⁹ *Ibid*, 588-589 (Dixon and Evatt JJ).

discharge any other function which has been entrusted to him by statute.¹²⁰

These cases can be seen to support the alternate ‘incompatibility’ approach to the separation of powers noted earlier. In their dissenting judgment in *Lowenstein*, Dixon and Evatt JJ framed this approach negatively, observing that ‘if the inherent character of the function reposed in the courts is at variance with the conception of judicial power, then, in our opinion, it must fail’.¹²¹ However, their Honours’ did not say that the opposite would be true: viz. that if a function is compatible with the conception of judicial power it will be valid. This positive restatement may have been broadly consistent with Evatt J’s earlier statement in *Dignan*, but it seems highly doubtful that Dixon J intended any such inference, as His Honour is generally acknowledged as the author of the majority judgment in the *Boilermakers’ Case* (and thus the second limb).¹²²

Despite various attempts to steer the High Court toward a broad separation of powers model similar to the British, however (which might have allowed the admixture of certain judicial and non-judicial functions within the same body) ‘the High Court had already laid the foundation for a contrary proposition’.¹²³ In *Re Judiciary and Navigation Acts*, the High Court ruled that Ch III courts were prohibited from providing ‘advisory opinions’.¹²⁴ The decision confirmed that the strict separation of judicial power was an essential feature of the federal model and, correspondingly, that

¹²⁰ *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 556 (Latham CJ), 566.

¹²¹ *Ibid* 588-589.

¹²² See, for example, Zines, above n 78, 602.

¹²³ Peter Hanks, Patrick Keyzer, and Jennifer Clarke, *Australian Constitutional Law: Commentaries and Materials*, (7th ed 2004), 394.

¹²⁴ (1921) 29 CLR 257 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; Higgins J in dissent).

Ch III provides an exhaustive account of the functions that may be vested in Ch III courts. In so doing, their Honours' also laid the final foundation for the second limb of the separation doctrine.

It is worth clarifying from the outset that the status of advisory opinions is only of contextual relevance to the development of judicial mediation. An evaluative model of judicial mediation may see a judge providing an opinion, but as mediation is non-determinative these opinions would not constitute advisory opinions in the sense prohibited by *Re Judiciary and Navigation Act* (that is to say, declarations of law). Rather, the importance of *Re Judiciary and Navigation Act* lies in the relationship between advisory opinions, the approach subsequently encapsulated in second limb of the separation doctrine, and the rule of law.

The facts of *Re Judiciary and Navigation Act* revolved around certain provisions of the *Judiciary Act 1903*, which purported to allow the Governor General to apply to the High Court for an advisory opinion as to the legal validity of any Act of Parliament. Their Honours' considered that the provision of advisory opinions was 'clearly a judicial function' (because it required an 'authoritative declaration of law') and was therefore an exercise of judicial power.¹²⁵ Whether Parliament could vest non-judicial powers in a court exercising federal jurisdiction was not, therefore, in issue.¹²⁶ Rather, the issue was whether Parliament had the power under s 76 to confer original jurisdiction upon the High Court to hear 'matters' (and whether the High Court could therefore exercise federal judicial power in respect of such matters) other than those specified in s 75; a question which the majority answered in the negative:

¹²⁵ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 264.

¹²⁶ Saunders, 'The Separation of Powers', above n 13, 12.

Section 75 confers original jurisdiction on the High Court in certain matters, and s 76 enables Parliament to confer original jurisdiction on it in other matters ... This express statement of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is, we think, clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction.¹²⁷

The High Court's decision in *Re Judiciary and Navigation Act* (and the principle that Ch III courts cannot provide advisory opinions) has been revisited on various occasions over the years, and the 'arguments for and against advisory opinions are well rehearsed'.¹²⁸ From a purely technical point of view (and as the majority in the *Boilermakers' Case* subsequently acknowledged) the case could simply have been determined by holding that advisory opinions are not an exercise of judicial power (because they do not involve the determination of an existing controversy), rather than by distinguishing between federal and non-federal judicial power.¹²⁹ However, the

¹²⁷ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.

¹²⁸ John Williams, 'Re-thinking Advisory Opinions' (1996) 7 *Public Law Review* 205, 205. These arguments were debated at length during the 'Adelaide Debates' (Australasian Federal Convention, *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897). Various Commonwealth Committees and Commissions have investigated this issue over the years: Commonwealth of Australia, Royal Commission on the Constitution, *Report of the Royal Commission on the Constitution* (1929); Commonwealth, *Senate Standing Committee on Constitutional and Legal Affairs: Advisory Opinions by the High Court*, Parliamentary Paper No 222 (1977); The Australian Constitutional Convention (*Minutes and Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Perth, 26 July 1978); Australian Judicial System Advisory Committee, Parliament of Australia, *Report of the Advisory Committee on the Australian Judicial System* (1987).

¹²⁹ (1956) 94 CLR 254, 274 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). The Privy Council agreed on appeal; *Attorney-General (Commonwealth) v R; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529, 541. The *Boilermakers' Case* does not affect the principle finding in *Re Judiciary*, however, that advisory opinion are not 'matters' within the meaning of 76. In fact, the High Court has since determined that the provision of advisory opinions will ordinarily be contrary to the judicial process (and not, therefore, within the meaning of judicial power: *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 357-358 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

bulk of arguments made in favour of advisory opinions have been practical in nature.¹³⁰ Critics of *Re Judiciary and Navigation Act* have argued that the provision of advisory opinions could lead to qualitative and quantitative benefits, including reduced litigation times and costs, increased certainty, timely legislative review in cases of emergency, and reduced friction between States and the Commonwealth (because advisory opinions are generally permissible in the former).¹³¹ Patrick Keyzer has argued that if members of the public could seek advisory opinions this could help to ‘achieve the objectives of equal respect and equal dignity, to enable the realization of constitutional identity, and to correct the power imbalance between the people and the politics’,¹³² by removing the need for litigants to demonstrate standing in constitutional cases.

Intrinsic in many of these arguments is the belief that advisory opinions will serve the rule of law. In John Williams view, the narrow interpretation of the term ‘matter’ is a ‘form or judicial gate-keeping,’¹³³ and should only be entertained

to the degree that it is informed by such fundamental notions as the rule of law, parliamentary responsibility and the separation of powers. It would be a strange situation if in focusing on the technical issues we lost sight of these fundamental principles.¹³⁴

¹³⁰ Stephen Crawshaw, ‘The High Court of Australia and advisory opinions’ (1977) 51 *Australian Law Journal* 112, 119: citing Terrance Smiljanich, ‘Advisory Opinions in Florida: An Experiment in Intergovernmental Co-operation’ (1971–1972) 24 *University of Florida Law Review* 328, 338.

¹³¹ These were the primary findings of the Australian Constitutional Convention (see *Minutes and Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Perth, 26 July 1978, 30–32).

¹³² Patrick Keyzer, ‘Open Constitutional Courts in Australia’ (PhD Thesis, the University of Sydney, 2008), 158.

¹³³ Williams, above n 128, 206.

¹³⁴ *Ibid* 208.

Kirby J has similarly opined that:

The current rather narrow state of authority on the Court's original jurisdiction to provide advisory opinions may one day require reconsideration as the Court adapts its process to a modern understanding of its constitutional and judicial functions ... The judicial function is not frozen in time. This Court should remain alert to developments in judicial procedures which further, in proper ways, the defence of the rule of law. So far as is compatible with the judicial function, courts should endeavour to be constructive and useful to parties in dispute.¹³⁵

Later in this thesis a similar argument is developed as regards the development of judicial mediation, and it is suggested, on this basis, that the procedural implications drawn from Ch III should be applied having regard to the purposive nature of the separation doctrine.

Despite the conceptual and practical difficulties associated with the High Court's approach in *Re Judiciary*, however, the prohibition on the provision of advisory opinions has also been defended on policy grounds.¹³⁶ In 1977, Stephen Crawshaw

¹³⁵ *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 666. See also *Re Wakim, Ex parte McNally* (1999) 198 CLR 511, 600 [186]-[187] (Kirby J): 'The makers did not intend, nor did they have the power to require, that their wishes and expectations should control us who now live under its protection. The Constitution is read by today's Australians to meet, so far as its text allows, their contemporary governmental needs. The Constitution, and in particular Ch III, does not impose Laocoönian constraints on this Court. The proper approach to Ch III, applicable to these proceedings, is that recently stated by Gleeson CJ and McHugh J in *Abebe v The Commonwealth*. Rigid and impractical outcomes are justified only by "the clearest constitutional language" which "compel them". As their Honours concluded in that case, so do I here. "Nothing in the language of Ch III forces such limited and rigid choices on the parliament".'

¹³⁶ In evidence to the Royal Commission on the Constitution, for example, Owen Dixon KC argued that advisory opinions would allow parties to engage the High Court in questions for purely political purpose. Sir Owen also argued that advisory opinions 'merely give you an advance copy of the judge's view, which is likely to change and which ought to change if further argument suggests to him that there are good reasons for taking another view'. Commonwealth of Australia, Royal Commission on

detailed seven arguments against advisory opinions.¹³⁷ John Williams has usefully summarised these arguments as follows (again, none of these arguments relate directly to judicial mediation):

The first [argument relates] to the fact that advisory opinions infringe the separation of powers doctrine in that [they call] upon the judiciary to undertake legislative functions. Secondly, the granting of such opinions would tend to politicize the court. Thirdly, advisory opinions by definition involve hypothetical questions that lack the depth of concrete examples. Fourthly, as these are hypothetical questions, there is unlikely to be provision for interested parties to have an opportunity to the present to the court arguments that might enrich the debate. Fifthly, abstract questions may be framed in such a way as to “mislead” the court in its adjudication so as to elicit the desired answer. Sixthly, advisory opinions may form binding precedent without the benefit of concrete facts. Seventhly, advisory opinions would impose a greater burden on the courts.

Stephen Crawshaw went on to debunk each of these arguments in turn, observing, *inter alia*: that the ‘politicisation’ argument falsely assumes that ‘by delivering an advisory opinion, a court becomes part of the executive or legislature;’¹³⁸ that the suggestion that the High Court should only consider legislation vis-à-vis existing controversies ignores the fact that, in reality ‘it is not necessary in many constitutional cases to have specific concrete facts before the court;’¹³⁹ and that, in any event, ‘the

the Constitution, *Minutes of Evidence*, Part 3, 791. Cf. Commonwealth, *Senate Standing Committee on Constitutional and Legal Affairs: Advisory Opinions by the High Court*, Parliamentary Paper No 222 (1977) 23.

¹³⁷ Crawshaw, above n 130, 120-26.

¹³⁸ *Ibid*, 121.

¹³⁹ *Ibid*, 122.

normal adversary system with its emphasis on conflict and self-interest is far from serving as the proper forum in which to determine important constitutional issues'.¹⁴⁰ Finally, Stephen Crawshaw argues that the predictable 'floodgates' argument (that advisory opinions would impose a greater burden on the courts) should not be allowed to trump the judiciary's constitutional obligations. In short, if the judiciary's workload must be increased to serve the rule of law, so be it.¹⁴¹ More recently, Helen Irving has argued that advisory opinions may (ironically) stymie the development of novel procedures that seek to improve access to justice:

[K]illing a law at birth might engender timidity in governments. Progressive legislation in Australia has often proceeded by constitutional 'adventures' undertaken by governments who are prepared to test the established constitutional limits and to make new constitutional arguments in support of their legislative programs. Persuasive new arguments, made in concrete cases concerning new legislative initiatives, advance the law. It is precisely this sort of legislation that is most likely to be subject to a negative opinion from the Court. Those (including Kirby J himself) who promote the view that the Constitution should adapt to current needs and values, should particularly value the opportunity to advance fresh perspectives in constitutional interpretation. Of their very nature, advisory opinions are likely to be conservative (as well as sterile) since the rules of construction ... which are designed to 'protect' legislation by constraining the Court in its dealings with 'live' Acts, are less likely to be a constraint on the Court in the formulating of an opinion.¹⁴²

¹⁴⁰ Crawshaw, above n 130, 123.

¹⁴¹ Ibid 124-25.

¹⁴² Helen Irving, 'Advisory Opinions, The Rule of Law, and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 105, 132-33.

With the greatest of respect, these arguments are unconvincing. First of all, the principal rule of construction to which Helen Irving refers is the presumption in favour of legislative validity.¹⁴³ The maxim *ut res valeat magis quam pereat* ('in order that the thing might rather have effect than be destroyed')¹⁴⁴ operates to maintain the separation of powers by preventing the judicial usurpation of legislative power.¹⁴⁵ Whether the author's reference to a "'live' Act' is a reference to a statute which is 'in force', or to a statute in respect of which individual rights are not at stake, is uncertain. In either case, however, why would the presumption in favour of validity not be applied if an Act was not live? What would be the point of an advisory opinion if the effect of this presumption was ignored? Even if this presumption is somehow 'less likely to be a constraint on the Court in the formulating of an opinion', why does it necessarily follow that the opinion delivered would be conservative and sterile as a result? Secondly, there does not appear to be any discernable policy reason why 'concrete cases' should be required before governments can make out a case in support of the legislation passed. Aside from the fact that important constitutional decisions have in the past been made by reference to hypothetical scenarios,¹⁴⁶ it is entirely appropriate that governments should be able to justify legislation before individual rights are placed in jeopardy. Charles Kingston made this point during the Adelaide Debates, beseeching delegates not to 'attach too much weight to the suggestion that we should go through the old routine of having to find some

¹⁴³ This presumption is examined in Chapters 3, 4, 5 and 6.

¹⁴⁴ *Butterworths Concise Australian Legal Dictionary* (3rd ed 2004), 446.

¹⁴⁵ *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153, 180 (Isaacs J); *A-G (Victoria) v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J).

¹⁴⁶ Including, significantly, the *Boilermakers' Case*, in which the High Court considered the Arbitration Court to be invalid without reliance upon the specific facts of the case: *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

unfortunate people to make it a personal quarrel before we can obtain the decision of the highest court in the realm'.¹⁴⁷ Finally, it is difficult to comprehend why expanding the opportunity for judicial scrutiny would undermine the 'opportunity to advance fresh perspectives in constitutional interpretation'. On the contrary, it seems axiomatic that the power to make advisory opinions would *increase* the opportunity to advance fresh perspectives.

In any event, the principle that Parliament may only require federal courts to exercise judicial power in respect of matters set out in Ch III is now, for better or for worse, settled law,¹⁴⁸ and (as the analysis in the following Chapters demonstrates) the High Court's application of the presumption in favour of validity has permitted all but the most extreme of the governments 'constitutional "adventures."' ¹⁴⁹ Moreover, and as noted above, the prohibition on the provision of advisory opinions does not directly affect the provision of judicial mediation. What is of importance in the current context is that the underlying principle in *Re Judiciary and Navigation Act* (that by negative inference Ch III limits the functions that may be vested in federal courts) was affirmed by the High Court in the *Boilermakers' Case*, and this proposition is now enshrined within the second limb or the separation doctrine. As a result of the second limb, mediation functions may only be vested in Ch III courts if they fall within the meaning of the term judicial power, or are incidental thereto.

¹⁴⁷ The Adelaide Debates, above n 128, 966.

¹⁴⁸ See, for example, *Re Wakim, Ex parte McNally* (1999) 198 CLR 511.

¹⁴⁹ Irving, above n 142.

Only judicial power or powers incidental thereto may be vested in Ch III

Courts (the ‘second limb’)

In the *Boilermakers’ Case* the High Court for the first time directly addressed the issue whether or not Parliament could confer judicial and non-judicial powers on the same body. Once again, the body in question was the Arbitration Court as reconstituted following *Alexander’s Case*, and the issue before the court was whether the power to make arbitral orders affecting the work and pay conditions of industry workers (a non-judicial power) and the power to enforce those orders and punish contempts of its power (both judicial powers) could be bestowed upon the same body.¹⁵⁰ As has already been intimated, the answer provided by a majority of the High Court¹⁵¹ (and the Privy Council on appeal)¹⁵² was that they could not. Specific considerations in the ruling included the extent of Parliament’s ‘incidental legislative power’ under s 51 and, more importantly, Parliament’s power to legislate in respect of Ch III judicial power.

The majority began by reaffirming the High Court’s position that the adoption of the British doctrine of responsible government as regards the separation of executive and legislature powers does not necessitate the rejection of the US constitutional model as regards the separation of judicial power.¹⁵³ Unlike the separation of executive and

¹⁵⁰ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 266.

¹⁵¹ *Ibid* 266-99 (Dixon CJ, McTiernan, Fullagar and Kitto JJ; Williams, Webb and Taylor JJ dissenting).

¹⁵² *Attorney-General (Commonwealth) v R; Ex parte Boilermakers’ Society of Australia* (1957) 95 CLR 529. Viscount Simonds provided the sole judgment.

¹⁵³ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 275. The US approach was nevertheless distinguished on the basis that the US Constitution grants a legislative power to create inferior tribunals, which the Australian Constitution does not, at 268.

judiciary, the majority considered that the clear ‘demarcation of the powers of the judicature’¹⁵⁴ is vital to the integrity of the Constitution, as

it cannot be left to the judicial power of the States to determine either the ambit of Federal power or the extent of the residuary power of the States ... The powers of the Federal judicature must therefore be at once paramount and limited. The organs to which Federal judicial power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained.¹⁵⁵

On this basis, the majority reasoned, while the legislative power granted to Parliament by s 51 (xxxix) allows Parliament to furnish federal courts with functions that are incidental ‘to the performance of the functions derived under or from Chap III ... [or] ... to the execution of the powers given by the Constitution to the federal judicature,’¹⁵⁶ this is necessarily the extent of s 51. With this exception, their Honours confirmed (as already established in the *Wheat Case* and *Alexander’s Case*), that all legislative acts ‘directed to’ the judicial power must accord with the requirements of Ch III. As such, no part of the judicial power may be vested in ‘any body or person except a court created pursuant to s. 71 and constituted in accordance with s. 72 or a court brought into existence by a State’.¹⁵⁷ The majority considered that it had already been decided ‘once and for all’ in *Alexander’s Case* ‘that the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different

¹⁵⁴ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 268.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* 270.

¹⁵⁷ *Ibid.*

order,’¹⁵⁸ thus the Arbitration Court was not a court for the purposes of s 71.¹⁵⁹ Consequently, as the powers to enforce orders and punish contempts are judicial powers, the relevant sections of the *Act* were necessarily invalid.¹⁶⁰

It is apparent that the High Court could have decided the *Boilermakers’ Case* solely on the basis of the rule in *Alexander’s Case* (the first limb), and it has been questioned whether the second limb was ‘really necessary to the resolution of the principal issue in the case’.¹⁶¹ The lasting significance of the decision, however, lies in the joining of the first limb with the second limb. The majority expressed the opinion that the recognition of the second limb was necessary in order to justify the first,¹⁶² although the basis for this opinion is unclear in the judgment:

There is, of course, a wide difference [between prohibiting the vesting of judicial powers in non-judicial bodies and the vesting of non-judicial powers in judicial bodies] ... But if the latter cannot be done clearly the former must then be completely out of the question. A number of considerations exist which point very definitely to the conclusion that the Constitution does not allow the use of courts established by or under Chap. III for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto.¹⁶³

The High Court and Privy Council decisions can be explained by reference to two interrelated considerations. The first consideration is the form and drafting of the

¹⁵⁸ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 281.

¹⁵⁹ *Ibid* 289.

¹⁶⁰ *Ibid* 299.

¹⁶¹ Ratnapala, above n 26, 162.

¹⁶² *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 271.

¹⁶³ *Ibid*.

Constitution,¹⁶⁴ which delineates between the executive and legislature on the one hand (which cannot be strictly separated because of the doctrine of responsible government)¹⁶⁵ and the judiciary on the other. The second consideration, which informs the first, is the role of the judiciary in the ‘maintenance and enforcement of the boundaries of federalism’.¹⁶⁶ According to the Privy Council (in language borrowed from the *Federalist*)¹⁶⁷ the strict separation of the judicial power is essential because

in a Federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.¹⁶⁸

It will be recalled that, in *Re Judiciary and Navigation Act*, the High Court distinguished between federal judicial power (which may be vested in federal courts) and non-federal judicial power, (which may be not be vested in federal courts), and that the High Court considered the provision of advisory opinions to fall within the latter category.¹⁶⁹ In the *Boilermakers’ Case*, the High Court disagreed (as did the Privy Council on appeal),¹⁷⁰ describing the distinction ‘between judicial power lying within Chap. III and judicial power lying outside Chap. III’ as ‘tenuous and unreal’.¹⁷¹ Rather, their Honours’ explained, the distinction ‘is between judicial power within

¹⁶⁴ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 272; *Attorney-General (Commonwealth) v R; Ex parte Boilermakers’ Society of Australia* (1957) 95 CLR 529, 538.

¹⁶⁵ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 275.

¹⁶⁶ *Ibid* 276.

¹⁶⁷ Hamilton, Madison and Jay, above n 16.

¹⁶⁸ *Attorney-General (Commonwealth) v R; Ex parte Boilermakers’ Society of Australia* (1957) 95 CLR 529, 540-41.

¹⁶⁹ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.

¹⁷⁰ *Attorney-General (Commonwealth) v R; Ex parte Boilermakers’ Society of Australia* (1957) 95 CLR 529, 541.

¹⁷¹ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 274.

Chap. III and other powers'.¹⁷² This conclusion derives, so the majority argued, from the textual arrangement of the Constitution:

To turn to the provisions of the Constitution dealing with those other powers or functions surely must be to find confirmation for the view that no functions but judicial may be reposed in the judicature. If you knew nothing of the history of the separation of powers, if you made no comparison of the Australian instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inferences from Chaps. I, II and III and the form and contents of ss.1, 61 and 71.¹⁷³

Their Honour's concluded that the demarcation of governmental powers between Chapters I, II, and III of the Constitution

confirms the inference to which its terms, independently considered, give rise, namely that courts established by or under its provisions have for their exclusive purpose the performance of judicial functions and that it is not within the legislative power to impose or confer upon them duties or authorities of another order.¹⁷⁴

¹⁷² *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 274-75.

¹⁷³ *Ibid* 275.

¹⁷⁴ *Ibid* 278.

The Privy Council agreed with the High Court that the separation of powers ‘is clearly to be seen’ in the structure of the Constitution.¹⁷⁵ Their Lordships also agreed that, by negative inference, the exclusive vesting of governmental powers in the executive, legislative and judiciary means that those powers cannot be vested in any another organ of government.¹⁷⁶ From this conclusion, their Lordships inferred that no power other than judicial power (or functions incidental thereto) may be vested in a Ch III court.¹⁷⁷

Williams J disagreed with the majority that a strict separation of powers could be inferred from the Constitution. His Honour expressed a preference for the approach taken in *Lowenstein*, in which the High Court had accepted the ‘contention that non-judicial functions cannot be imposed on a court which are incompatible with its strict judicial functions:’¹⁷⁸

In relation to Chap III the [separation of powers] doctrine means that only courts can exercise the judicial power of the Commonwealth, and that nothing must be done which is likely to detract from their complete ability to perform their judicial functions. The Parliament cannot, therefore, by legislation impose on the courts duties which would be at variance with the exercise of these functions or duties and which could not be undertaken without a departure from the normal manner in which courts are accustomed to discharge those functions.¹⁷⁹

¹⁷⁵ *Attorney-General (Commonwealth) v R; Ex parte Boilermakers’ Society of Australia* (1957) 95 CLR 529, 537.

¹⁷⁶ *Ibid* 538.

¹⁷⁷ *Ibid* 539, 554.

¹⁷⁸ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 313.

¹⁷⁹ *Ibid* 314.

Contrary to the view of Isaacs and Rich JJ in *Alexander's Case*, Williams J found 'nothing at variance between the arbitral duty to make the award and the curial duty to enforce it.'¹⁸⁰

The Constitution like any other written instrument must be construed as a whole and it appears to me that, far from any implication arising from its provisions as a whole that this Court and other federal courts that the Parliament creates cannot be invested with other than judicial powers, the implication in the case of some of the powers conferred on the Parliament by s 51 of the Constitution, arising from their language, if implication be needed, is to the contrary ... Unless there is something tacit in the Constitution which prevents the whole of these functions being performed by one tribunal it would appear to be convenient that the one tribunal should perform them.¹⁸¹

Williams J's focus on the Constitution 'as a whole' has found support more recently as a means of bringing the territories within the 'federal compact,'¹⁸² and, as already noted, His Honour's incompatibility approach has been revived as an aspect of the *persona designata* exception and the *Kable* doctrine. Insofar as Ch III courts are concerned, however, it is the separation doctrine (comprising the two limbs adjoined in the *Boilermakers' Case*) which emerges as the appropriate mechanism by which to

¹⁸⁰ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 317.

¹⁸¹ *Ibid* 307.

¹⁸² This topic is considered at length in Chapter 6. The principle cases are *Lamshed v Lake* (1958) 99 CLR 132; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 370-72 (Dixon J); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 568 (Gaudron J), 598 (Gummow J), 662 (Kirby J); *Kruger v Commonwealth* (1997) 190 CLR 1, 175 (Gummow J); *Northern Territory v GPAO* (1999) 196 CLR 553, 604-05 [128]-[133] (Gaudron J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309, 353-354 [74] (French CJ), 388-389 [188]-[189] (Gummow and Hayne JJ), 419 [286] (Kirby J).

determine the functions that may be vested in those courts.¹⁸³ What, then, does the separation doctrine seek to achieve?

What is the object of the separation doctrine?

As has been noted on a number of occasions in the preceding analysis, determining the object of the separation doctrine is a crucial pre-requisite to establishing whether judges can or should mediate. Most commentators agree that the separation doctrine rests not upon ‘the text of the Constitution but matters of policy related to the exercise of judicial power’,¹⁸⁴ but there are subtle differences of opinion as to what, precisely, those matters of policy are. This section demonstrates that, although the approach adopted by High Court and the Privy Council’s in the *Boilermakers’ Case* may be explained by reference to the principles of federalism, the ultimate object of the separation doctrine must be the preservation of liberty; ergo the rule of law.

Alexander Hamilton famously described the US Supreme Court¹⁸⁵ as the ‘faithful guardians of the constitution’, and the judiciary as ‘bulwarks of a limited constitution against legislative encroachment’.¹⁸⁶ In federal Australia, the essentiality of the High Court’s independence has been explained (using similar language) by reference to that Court’s role as the ‘guardian of the Constitution’.¹⁸⁷ The Blackstonian approach to power separation adopted in the UK also recognises the independence of the judiciary

¹⁸³ Booker, Glass and Watt, above n 6, 154.

¹⁸⁴ Zines, above n 78, 217.

¹⁸⁵ One notable distinction between the US Supreme Court and the Australian High Court is that the latter can hear appeals from State supreme courts in original jurisdiction, as well as State courts vested with federal jurisdiction (Sec 75). It is far less significant to establish, therefore, whether the jurisdiction of the State court in question was State or federal, as the High Court is able to consider the merits of both. In contrast, the appellate jurisdiction of the United States Supreme Court is confined to federal matters, and State matters are subject only to judicial review.

¹⁸⁶ Hamilton, Madison and Jay, above n 16, 78.

¹⁸⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10971, 10981 (Alfred Deakin).

as an essential ‘preservative of the public liberty’.¹⁸⁸ However, according to Haig Patapan, the High Court’s approach to the separation of the judicial power is

not, in fact, grounded upon Blackstonian conceptions. On the contrary, the [High] Court ... [*has returned*] to one strand of the Federalist justification to support separation of judicial powers, the view of the judiciary as an essential adjudicator of the boundaries of federalism.¹⁸⁹

Keven Booker, Arthur Glass and Robert Watt, have similarly concluded that:

[W]hile an independent judiciary will be the hallmark of any society that claims to be under the ‘rule of law’, and in many unitary forms of government it will be argued for under the banner of separation of powers, the High Court has recognised and attached great importance to the separation of powers in order to achieve judicial independence because of the role played by that Court in the interpretation of a Federal Constitution. [B]ecause of the technicality that can be associated with identifying the scope of the judicial power, this may well leave room for the argument that the reasons for seeking it have been forgotten.¹⁹⁰

While these views accurately reflect the reasoning adopted by the High Court, outlined above, it must be recognised that the federalist approach is not an end in itself. The separation doctrine may reflect the need to protect the High Court’s role as the guardian of the Constitution, but this role is in turn necessary to maintain the rule

¹⁸⁸ Blackstone, above n 18, Book 1, 268.

¹⁸⁹ Haig Patapan, ‘Separation of Powers in Australia’ (1999) 34 *Australian Journal of Political Science* 391, 399.

¹⁹⁰ Booker, Glass and Watt, above n 6, 152-53.

of law.¹⁹¹ As Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ stated in *Wilson v Minster for Aboriginal and Torres Strait Islanders*, the ‘separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges’.¹⁹² For this reason, Fiona Wheeler’s conclusion that ‘the exclusive vesting of federal judicial power in Chapter III courts, although suggested by s71 of the Constitution, draws decisive force from our inherited legal traditions and the need to promote the supremacy of law over Parliament,’¹⁹³ is preferable. On either view, however, it can be agreed that the ‘general policy’ of the separation doctrine is to ensure the independence and impartiality of the judiciary.¹⁹⁴ The first limb serves this objective by maintaining the exclusive jurisdiction of the High Court. The second limb serves this object by protecting the judiciary’s power to regulate its own processes (‘inherent’ jurisdiction).¹⁹⁵ This object, and the subtly distinct ways in which the two limbs of the separation doctrine serve it, is examined in more detail in the following Chapters.

¹⁹¹ ‘The law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and its servants; thus the constitution is the result of the ordinary law of the land’. Albert Venn Dicey, above n 18, 203.

¹⁹² (1996) 189 CLR 1, 11.

¹⁹³ Wheeler, ‘The Doctrine of Separation of Powers’ (1997) 23(2) *Monash University Law Review* 248, 253. See also Ratnapala, above n 26, 162.

¹⁹⁴ Christine Parker, ‘Protection of Judicial Process as an Implied Constitutional Principle’ (1994) 16 *Adelaide Law Review* 341, 354.

¹⁹⁵ Wendy Lacey, ‘Inherent Jurisdiction, Judicial Power, and Implied Guarantees under Chapter III of the Constitution’ (2003) 31 *Federal Law Review* 57.

Does the ‘second limb’ still matter?

Criticisms of the second limb of the *Boilermakers’ Case* have ‘been around for nearly as long as the case itself’.¹⁹⁶ By and large, these criticisms have been directed at the practical consequences of the rule, and in particular the difficulties associated with classifying powers as judicial or non-judicial in nature.¹⁹⁷ According to Sir Anthony Mason, one of the most common ‘shortcomings’ attributed to the second limb of the rule in the *Boilermakers’ Case* is that it requires ‘the classification of functions according to the concept of judicial power’, which is itself historically difficult to define.¹⁹⁸ In *R v Joske; Ex parte Australian Building Construction Employees and Builder’s Labourers’ Federation* (*R v Joske*), Barwick CJ expressed the opinion that the ‘principal conclusion’ of the High Court was unnecessary

for the effective working of the Australian Constitution or for the maintenance of the separation of the judicial power of the Commonwealth or for the protection of the independence of the courts exercising that power. The decision leads to excessive subtlety and technicality in the operation of the Constitution without ... any compensating benefit’.¹⁹⁹

As a matter of logic, it is also difficult to understand how the considerations outlined by the High Court and Privy Council lead independently or collectively to the

¹⁹⁶ Booker, Glass and Watt, above n 6, 168.

¹⁹⁷ See generally, Patrick Lane, ‘The Decline of the Boilermakers Separation of Powers Doctrine’ (1981) 55 *Australian LawJournal* 6.

¹⁹⁸ Sir Anthony Mason, ‘A New Perspective on Separation of Powers’ (1996) No 82, *Canberra Bulletin of Public Administration* 1, 5.

¹⁹⁹ *R v Joske; Ex parte Australian Building Construction Employees and Builder’s Labourers’ Federation* (1974) 130 CLR 87, 90. Mason J was also of the opinion, at 102, that ‘a series of questions arise as to the course which this Court should adopt in relation to the principle conclusion reached’.

conclusion that all non-judicial powers are necessarily executive or legislative in nature. First of all, while it was certainly open to the High Court and Privy Council to rule that, because certain powers are positively vested in one branch of government those powers cannot be vested in another branch of government, it does not follow by necessary implication that only judicial power may be vested in or carried out by courts.²⁰⁰ In order to reach this conclusion it must first be accepted that legislative, executive and judicial power ‘constitute the sum total of all power that lies outside the province of judicial power’²⁰¹ (or there would be no threat to the separation of powers). And, according to Leslie Zines,

there is no clear warrant for the view that all functions can be subsumed under the categories ‘legislative’, ‘executive’ and ‘judicial’. If that is so, the maxim [*expressio uniuns est exclusio alterius*] does not lead to the conclusion of the Privy Council that powers which cannot be so categorised and are outside the scope of Chapter III cannot be conferred on a court.²⁰²

Geoffrey Sawer, on the other hand, has stated that:

The Australian Constitution cannot be worked by supposing classes of function which are not covered by the conceptions of legislative, executive and judicial power, and which therefore can be allocated – presumably at the will of Parliament – to any of the three established branches of government. The logic of negative inferences from positive

²⁰⁰ Geoffrey Sawer, ‘The Separation of Powers in Australian Federalism’ (1961) 35 *Australian Law Journal* 177, 179.

²⁰¹ Ratnapala, above n 26, 62.

²⁰² Zines, above n 78, 217; citing Jacob Fajgenbaum and Peter Hanks, *Australian Constitutional Law* (1972), 407.

statutory provisions on which the *Boilermakers' Case* formally depends may involve to some extent the fallacy of simple conversion or begging the question, but the Constitution does not stand alone; it is part of a complex structure of law which includes the pre-existing State Constitutions and the general body of the common law, and there is no formal fallacy in inferring from that system as a whole the proposition that the positive powers of the Commonwealth are confined to those set out in the Constitution. Hence any function must somehow be fitted into the categories there given, or must fall within the residuary powers of the States.²⁰³

Geoffrey Sawer's conclusion reflects the High Court's belief, expressed in the *Boilermakers' Case*, that the 'powers of the Federal judicature must ... be at once paramount and limited'.²⁰⁴ Inherent in this conclusion is the proposition that the Commonwealth derives its powers from the States, and that any powers which are not incidental to the judicial power or capable of designation as legislative, executive or judicial in nature, therefore belong to the States and cannot be vested in or carried out by Ch III courts. With the utmost respect, this conclusion disregards the fact that all State and federal powers and institutions 'spring from the same source – British sovereignty',²⁰⁵ and that both are 'in fact merely different grantees and trustees of power, acting for an on behalf of the people of the Commonwealth'.²⁰⁶ Once this simple fact is accepted there is no reason whatsoever why a function which falls outside the category of legislative, executive or judicial must belong to the States. If anything, it must belong to the Imperial Parliament.

²⁰³ Sawer, above n 200, 177-78.

²⁰⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275.

²⁰⁵ Quick and Garran, above n 9, 928.

²⁰⁶ *Ibid.*

In addition to the raft of definitional problems set in motion by the second limb, it may be unnecessary to apply the rule to any Ch III court other than the High Court.²⁰⁷

Leslie Zines explains that, as the High Court is the only Court ‘guaranteed jurisdiction over the commonwealth,’²⁰⁸ and is omnipresent as the final appellate court in all federal matters, it is irrelevant whether the ‘admixture’ of judicial and non-judicial functions would ‘sap the independence’ of other federal and State courts.²⁰⁹ Provided that the High Court itself is not vested with non-judicial powers the appellate jurisdiction of the Court will continue to provide a constitutional safeguard, and the object of the second limb will be satisfied.²¹⁰

It might be added that when the decision in the *Boilermakers’ Case* was handed down the Federal Court, Family Court and Federal Magistrates Court did not exist, and that, whether truly necessary at the time or not, the second limb may simply no longer reflect the complexities of Australia’s contemporary judicial system. Keven Booker, Arthur Glass and Robert Watt, have asked:

With the Federal Court now occupying such an increasingly important role in the determination of general federal litigation, and with the High Court’s caseload increasingly being restricted to the more important constitutional

²⁰⁷ Zines, above n 78, 297; Booker, Glass and Watt, above n 6, 169.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ There may be circumstances in which the High Court has no appellate jurisdiction, but generally speaking ‘it has been assumed that the reference to judgments, decrees, orders and sentences relates to determinations made by the relevant courts in the exercise of judicial power’. *Mellifont v A-G (Qld)* (1991) 173 CLR 289, 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ). In any event, although judicial mediation does not involve a judicial decision as such, the settlement produced will be enforced as a consent order, which is appealable under s 73 of the Constitution. This issue is examined in Chapter 3. It might also be noted that certain civil law countries, such as Germany, have created a distinct hierarchy of constitutional courts, thereby circumventing this issue.

matters, is there a constitutional need to keep all of the federal judges at arms length and untainted from contact with the Federal Executive?²¹¹

On the other hand, Leslie Zines points out, to focus purely on this policy argument would be to ignore the importance that both the High Court and the Privy Council attached to the ‘form and drafting’ of the Constitution, s 72 of which vests judicial power in the High Court and ‘such other courts as Parliament creates’.²¹² To distinguish between courts vested with federal judicial power on the basis that the independence of the High Court alone is necessary to safeguard the Constitution would, therefore, ‘be to rely on the principle of the separation of powers directly and mainly, giving only subordinate weight to the textual considerations that predominated in the judgment’.²¹³ The High Court has also made it increasingly clear in recent years that Australia has an ‘integrated’ judiciary, in which the actions of one court reflect on the integrity of all others.²¹⁴ That being so the sapping of independence and impartiality from any Australian court could theoretically interfere with the High Court’s role as the guardian of the constitution. This possibility is examined in Chapter 6.

One final, and critical, point should be made. Although the approach adopted by the High Court in the *Boilermakers’ Case* has been criticised, the purpose of the second limb has not. Academic and judicial critiques have questioned whether strict power separation is the most appropriate mechanism by which to protect the judicial function

²¹¹ Booker, Glass and Watt, above n 6, 169.

²¹² Zines, above n 78, 297.

²¹³ Ibid.

²¹⁴ *Kable v DPP* (NSW) (1996) 189 CLR 51; *Kruger v Commonwealth* (1997) 190 CLR 1, 175 (Gummow J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471.

from legislative interference, but they have not suggested that it should not be protected. The object of the separation doctrine is considered in more detail in Chapter 4.²¹⁵

Do the implications of the separation doctrine affect rules of court?

One final issue must be addressed before considering in detail the specific rules derived by the High Court from Ch III. In Chapter 8 it is demonstrated that, in order to be implemented effectively, judicial mediation will require the provision of a broad procedural discretion (or a series of discretions). Such discretions may be vested in Ch III courts directly by the Commonwealth Parliament, or by the judiciary itself as rules of court. Accepting that the second limb of the separation doctrine limits the functions that may be vested in Ch III courts by Parliament, does it also affect the functions that judicial committees can establish in the form of court rules?

To answer this question it is first necessary to determine how, precisely, the power to mediate would be vested in a Ch III court by Parliament. Section 51 (xxiv) of the Constitution confers on Parliament the power to make laws with respect to ‘the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States’. Section 51 (xxxix) also confers on Parliament the power to make laws for matters ‘incidental to the execution of any power vested ... in the Federal Judicature’. Both of these powers are ‘subject to’ the Constitution, and thus the meaning of the term judicial power as defined by the High Court. If judicial mediation is implemented by Parliament *via* primary legislation, then the rules stemming from the separation doctrine (outlined in the following two

²¹⁵ See below Chapter 4 nn 10-49 and accompanying text.

Chapters) will limit that function to the extent that it affects a federal court (or courts) created under s 71. These rules will also limit the functions that State or territory parliaments may vest in the ‘other courts’ referred to in s 71 when exercising federal judicial power under s 71, but they will not otherwise limit State or territory legislative power.²¹⁶

As explained in Chapters 7 and 8, however, it seems more likely that judicial mediation will continue to develop within the incidental/inherent jurisdiction of the courts.²¹⁷ Rules of court are a form of delegated legislation,²¹⁸ and in federal courts created under s 71 this function is delegated as an incidental function by virtue of s 51 (xxxix).²¹⁹ It follows that rules of court determined by federal courts are notionally subject to the same principles of validity as rules vested directly in those courts by Parliament (because, either way, the discretion ultimately belongs to Parliament). However, as explained above, the separation doctrine is rooted in ‘the need to

²¹⁶ The position of the States and territories is considered in Chapter 6. In brief, however, the High Court has traditionally adopted the view that Parliament must take State courts as it finds them (*Federated Sawmill, Timberyard and General Woodworkers’ Employees’ Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308). As such, the separation doctrine only applied to State courts vested with judicial power when actually exercising that power. This position has since been altered by *Kable v DPP* (NSW) (1996) 189 CLR 51 so that certain implications of CH II do also apply to State courts. Territory Courts were not subject to the separation doctrine because they created under s 122 (which is contained in Ch V) and were not traditionally considered to be subject to Ch III at all (*R v Bernasconi* (1915) 19 CLR 629, 635 (Griffith CJ)). It is apparent that they may now be vested with federal judicial power under s 71, however, and may therefore be considered ‘other courts’ in the same manner as State courts are for the second limb of the *Boilermakers’ Case* (See, for example, *Northern Territory v GPAO* (1999) 196 CLR 553, 604-05 [128]-[133] (Gaudron J)). This position was confirmed in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

²¹⁷ See, for example, *Federal Court Rules* 1979, O 72; *Supreme Court Civil Rules* 2006 (SA), r 126; *Supreme Court Consolidated Practice Directions* (Jan 2009) (WA) Para 4.2.

²¹⁸ The *High Court Rules* 2004 are made by a majority of the Justices of the High Court under s 48 of the *High Court of Australia Act* 1979. The *Federal Court Rules* 1979 are made by a judicial committee in accordance with s 59 of the *Federal Court of Australia Act* 1976. The *Family Law Rules* 2004 are made by a majority of judges under s 123 of the *Family Law Act* 1975; The *Federal Magistrates Court Rules* 2001 are made by a majority of Federal Magistrates under s 81 of the *Federal Magistrates Act* 1999, and are supplemented by the *Federal Court Rules* 2004 (s 1.05). Note, however, that these rules are actually created by the Commonwealth Attorney General’s Department. The onset of judicial self-governance, and what this function means for the nature of the judicial function, is considered in Chapter 7.

²¹⁹ *R v Davison* (1954) 90 CLR 353, 368 – 369 (Dixon CJ and McTiernan J).

promote the supremacy of law over Parliament'.²²⁰ If rule making power is in fact exercised by the judiciary, then there is no risk of this object being subverted. This raises the question: do the constitutional implications stemming from the separation doctrine apply to rules of court created by federal courts? The answer to this question is almost certainly 'yes', but there is little authority on point. As Dennis Pearce and Stephen Argument have observed:

Questions relating to the validity of the rules of the superior courts arise infrequently. When they do, the general principles that apply to delegated legislation made by the executive are applied to determine validity. The issue that arises most frequently is whether the rules are concerned with matters of 'practice and procedure' or whether they attempt to deal with issues extending beyond this description.²²¹

The 'general principle' as regards delegated discretionary powers was expressed by Latham CJ in *Shrimpton v Commonwealth*.²²² His Honour explained that the 'discretion must be used and the power exercised bona fide and with the view of achieving ends or objects not outside the purpose for which the discretion or power is conferred'.²²³ Thus, if a rule of court were to sanction the performance of a function that was contrary to the implications deriving from the separation doctrine, that rule would exceed the discretionary rule making power granted by the relevant statute, and would be invalid.

²²⁰ Wheeler, above n 193.

²²¹ Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (3rd ed 2005), 120; citing *Harrington v Lowe* (1996) 190 CLR 311; *Ousley v R* (1997) 192 CLR 69; *State Bank of South Australia v Hellaby* (1992) 59 SASR 304; *Airservices Australia v Transfield Pty Ltd* (1999) 92 FCR 200.

²²² (1945) 69 CLR 613.

²²³ *Ibid* 620.

There is another reason why rules of court must be subject to the same Ch III implications as primary legislation however, which is equally important. Chapter 4 demonstrates that, by vesting judicial power in Ch III courts, ‘the Constitution’s intent and meaning were that judicial power would be exercised by those courts with all that that notion essentially requires’.²²⁴ It would hardly serve that purpose if judicial committees were able to vest in Ch III courts functions that required them to conduct proceedings in a manner that undermined judicial independence and impartiality. This view is indirectly supported by Kirby J’s dissenting opinion in *APLA Ltd v Legal Services Commissioner*:

[T]he rule of law ... lies at the heart of the Judicature provided for in the Constitution. Attempts by law to alter, impair or detract from that hypothesis immediately invite consideration of the prescription necessarily implied in Ch III ... [L]awmakers (including judges expressing the common law) cannot impede [those implications].²²⁵

The same reasoning naturally applies in respect of rules of court applicable to State courts when exercising federal jurisdiction. What, though, of the rules that apply in State and territory courts when they are *not* exercising federal judicial power (or in courts not vested with that power at all)? In such instances the separation doctrine has no application, but the *Kable* doctrine does,²²⁶ and this doctrine was extended to territory courts in *NAALAS v Bradley*.²²⁷ Court rules in the States and territories are

²²⁴ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.

²²⁵ (2006) 224 CLR 322, 440-41.

²²⁶ *Kable v DPP* (NSW) (1996) 189 CLR 51.

²²⁷ (2004) 218 CLR 146 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

also made by way of delegated legislation.²²⁸ Thus, a rule of court that is ‘incompatible’ with the nature of judicial power will be invalid, in just the same way as a rule of court subject to the second limb of the separation doctrine will be. Unless otherwise indicated, therefore, a reference in this thesis to a statutory provision may be interpreted as a reference to a rule of court, and the principles set out in the following Chapters will apply to the development of judicial mediation regardless of how judicial mediation is actually implemented in practice.

Summary and approach to subsequent analysis

The purpose of this Chapter has been to introduce certain of the key concepts and principles that underpin the analysis in the following Chapters. To this end, four overlapping jurisdictions have been identified which operate to maintain the rule of law – appellate, supervisory, exclusive, and inherent – and the role of the separation doctrine in safeguarding the latter two of these jurisdictions has been briefly outlined.²²⁹ It has also been explained that, whether or not the separation doctrine stands up to 60 years of judicial and academic scrutiny, the two limbs adjoined in that

²²⁸ The *Uniform Civil Procedure Rules 1999* (Qld) (which apply to the Queensland Supreme Court, District Court and Magistrates Court) are established under s118 the *Supreme Court of Queensland Act 1991* by the Governor in Council and approved by a ‘Rules Committee’ comprising judges from each of the courts. The *Supreme Court Rules 2000* (Tas) are made under s 200 of the *Supreme Court Civil Procedure Act 1932* (Tas). The *Uniform Civil Procedure Rules* (NSW) (which apply to the NSW Supreme Court, District Court and Magistrates Court) are created in accordance with s 9 of the *Civil Procedure Act 2005* (NSW) by a ‘Uniform Rules Committee’ established in s 8 of the *Act*. The *Supreme Court Civil Rules 2006* (SA) (and other rules) are made by ‘three or more judges’ under s 72 *Supreme Court Act 1935* (SA). The *Supreme Court (General) Rules 2005* (WA) (and other rules) are made by ‘the judges of the Supreme Court’ under s 167 of the *Supreme Court Act 1935* (WA). Rules of court in Victoria are more piecemeal than other States, but are all made under s 25 of the *Supreme Court Act 1989* (Vic). Rules of court in the Northern Territory are made by a majority of judges under s 86 of the *Supreme Court Act 1979* (NT); The *Court Procedure Rules 2006* (ACT) are made by a ‘rule making committee’ established under s 9 the *Court Procedures Act 2004* (ACT) (rule-making power is conferred on that committee by s 7).

²²⁹ It is not suggested that these four jurisdictions are the *only* jurisdictions necessary to maintain the rule of law, merely the most applicable to this thesis.

case are now firmly established tenets of Australian constitutional jurisprudence.²³⁰ As such, the scope and meaning of the term judicial power remains critical to determining which functions Parliament may vest in Ch III courts,²³¹ and whether judicial mediation is constitutional. As noted, however, the distinction between judicial and non-judicial power, and the range of incidental functions that may be vested in Ch III courts, is often difficult to discern. Various streams of precedent have consequently emerged which seek to determine whether given powers or functions fall within the meaning of judicial power or functions incidental thereto. These streams can be categorised as pertaining to one of three broad definitional approaches: the subject of judicial power, the indicia of judicial power, and the exercise of judicial power.²³²

The first approach is not directly relevant in the current context because, as pointed out earlier in this Chapter, judicial mediation does not affect the ‘matters’ in respect of which Ch III courts may exercise judicial power – merely the way in which those matters are determined. The second and third of these approaches are of direct relevance to judicial mediation, however. Chapter 3 examines the High Court’s analysis of the indicia of judicial power, and demonstrates that, while judicial mediation cannot be classified as a judicial power, it may be classified as a function incidental thereto.

²³⁰ See, for example: *Steele v Defence Forces Retirement Benefits Board* (1955) 92 CLR 177, 186, 187; *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* [No 2] (1982) 152 CLR 179, 183, 186-87; *Gould v Brown* (1998) 193 CLR 396, 400-01, 419, 440, 449-500; *Re Wakim*; *Ex Parte McNally* (1999) 198 CLR 511.

²³¹ See, for example; *Thomas v Mowbray* (2007) 233 CLR 307, 426-28 [340]-[344] (Kirby J), 467 [472] (Hayne J).

²³² Suri Ratnapala identifies three ‘aspects or power’: ‘jurisdiction, mode of action, and the consequences of action’. Above n 26, 123.

CHAPTER 3

JUDICIAL POWER AND INCIDENTAL FUNCTIONS

In Chapter 2 it was explained that the strict approach to power separation adopted by the High Court assumes that all governmental functions can be classified as legislative, executive or judicial in nature. It was also noted that the second limb of the rule in *Boilermakers*¹ restricts the functions that may be vested in federal courts to those that are within or incidental to the meaning of the term ‘judicial power’, and that various overlapping streams of High Court precedent can be distinguished which seek (in differing ways) to distinguish between judicial and non-judicial functions.

This Chapter considers the High Court’s attempts to identify the defining features, or ‘indicia’, of judicial power, and concludes that while mediation is irrefutably a non-judicial function (because it does not result in a binding determination of existing rights), this fact alone does not preclude federal courts from exercising mediation functions.¹ The argument presented is essentially as follows: judicial mediation is comparable with other prehearing processes which represent discrete steps, or ‘incidents’, in the litigation process. These processes may alter the course that proceedings take, but they do not remove the decision-making power of the court. While incidental functions are typically limited to functions historically associated with the judicial process, this does not mean that novel functions cannot also be vested in courts. What matters in such instances is whether the function in question is

¹ To the author’s knowledge no court in Australia has yet classified mediation as a function exclusive to any particular branch of government. David Spencer has made the same observation: David Spencer, ‘Judicial Mediators: Is the time right? – Part 1’ (2006) 17 *Australian Dispute Resolution Journal* 130, 135. The issue was discussed but left unanswered in *Fagshall v Foster* (1995) 50 *Dispute Resolution Journal* 86.

capable of judicial application. Theoretically, a function will be incapable of judicial application if it requires a court to determine new rights,² or to conduct proceedings in a manner contrary to the ‘judicial process’.³ Since mediation does not affect existing rights it is the second of these requirements which is of particular relevance to the development of judicial mediation. This requirement (the ‘judicial process’ implication) is the focus of Chapter 4.

The Primary Indicia

The term ‘judicial power’ has proven difficult to define. In *R v Davison*, Dixon CJ and McTiernan J noted that, ‘many attempts have been made to define judicial power, but it has never been found possible to frame a definition that is at once exclusive and exhaustive,’⁴ and in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (the ‘*Tasmanian Breweries*’ case), Windeyer J commented that ‘the concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis’.⁵ In *Cabal v United Mexican States*, the Federal Court explained that:

The difficulty of characterising a particular exercise of power as administrative or judicial and thus of defining exhaustively the boundaries of judicial power stems from the fact that there is not a true dichotomy between

² *Blackburn, Low & Co v Vigors* (1887) 12 QBD 531; *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *Waterside Workers' Federation of Australia v JW Alexander* (1918) 25 CLR 434, 464 (Isaacs and Rich JJ).

³ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607 (Deane J). The ‘judicial process’ implication represents the culmination of the second ‘stream’ outlined in the Chapter 2 (the exercise of judicial power), and is considered in detail in Chapter 4.

⁴ *R v Davison* (1954) 90 CLR 353, 366.

⁵ *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394. See also *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 497 (Gaudron J), ‘it may not yet be possible to define judicial power in a way that is at once exclusive and exhaustive’.

powers as such which may be said to be judicial and those which may be said to be administrative.⁶

Similar observations have been made as regards the boundary between adjudication and mediation; a point discussed at length in Chapter 7. Despite these difficulties, judicial power is characterised at the most rudimentary level by three primary elements or ‘indicia’.⁷ Whether a given power or function falls within the concept of judicial power, ‘depends upon the indicia present in the power being ‘weighed up’ against those which are absent, or against other indicia to the contrary’.⁸ The ‘primary’ indicia can be distilled from early judicial attempts to define judicial power. The ‘classical statement’⁹ of judicial power was provided by Griffith CJ in *Huddart v Parker*, and provides the natural starting point for most commentaries:¹⁰

I am of the opinion that the words judicial power as used in s 71 of the Constitution mean the power of which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property; The exercise of this power does not begin until some tribunal which has the power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.¹¹

⁶ *Cabal v United Mexican States* (2001) 108 FCR 311; [2001] FCA 427, [77] (Hill, Weinberg and Dowsett JJ). As discussed at length in Chapter 6, similar language has been adopted by ADR theorists in relation to the taxonomy of ideologically discrete dispute resolution processes.

⁷ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, (3rd ed 2002), 621.

⁸ *Ibid.*

⁹ *R v Davison* (1954) 90 CLR 353, 387 (Taylor J).

¹⁰ See, for example, Keven Booker, Arthur Glass and Robert Watt, *Federal Constitutional Law: An Introduction* (2nd Ed 1998); Blackshield and George Williams, above n 7, 619-620; Suri Ratnapala, ‘Australian Constitutional Law (2nd ed 2007) 125; Leslie Zines, *The High Court and the Constitution* (5th ed, 2008) 219.

¹¹ (1909) 8 CLR 330, 357.

Oliver Wendell Holmes expressed a similar formulation of judicial power, explaining that ‘a judicial enquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws already supposed to exist,’¹² and according to Palles CB:

[T]o make [a tribunal’s] determinations judicial, the essential element is that it should have power, by its determination within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact.¹³

As Dixon CJ and McTiernan J pointed out in *R v Davison*, Griffith CJ emphasised the fact that judicial power can be exercised only in respect of an existing controversy, whereas Palles CB stressed the importance of pre-existing rights.¹⁴ Oliver Wendell Holmes did not emphasise the importance of any particular element, but observed all three. In the *Tasmanian Breweries* case, Kitto J explained that in his view:

[A] judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the exercise of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the

¹² *Prentis v Atlantic Coast Line Co*, 211 US 210 (1908), 226-27.

¹³ *The Queen v Local Government Board* (1902) 2 IR 349, 373 (Palles CB).

¹⁴ *R v Davison* (1954) 90 CLR 353, 367-68.

facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist.¹⁵

These formulations, all of which have ‘distinct echoes of the Diceyan formulation of the Rule of Law,’¹⁶ can be distilled to reveal the primary indicia of judicial power in Australia:¹⁷

- 1) A existing controversy
- 2) A binding and authoritative decision
- 3) Pre-existing rights (life, liberty and property)

According to Leslie Zines, if ‘these three elements are present, that is, the function involves a conclusive determination of a controversy about existing rights, the function belongs exclusively to the judiciary’.¹⁸ In addition, the second limb of the rule in the *Boilermakers’ Case* confirms that a function which does not satisfy these three elements is necessarily non-judicial in nature. However, it does not follow that the judiciary cannot exercise functions which are non-judicial. Indeed, the courts have frequently exercised non-judicial functions on the basis that they are incidental to the exercise of judicial power, and it is within this category that, for the reasons set forth in this and the following Chapters, mediation is properly to be classified.

¹⁵ (1970) 123 CLR 361, 374-75.

¹⁶ Alan Hall, ‘Judicial Power, the Duality of Functions and the Administrative Appeals Tribunal’ (1994) 22 *Federal Law Review* 13, 18. The relationship between the rule of law and the meaning of judicial power is examined further in Chapter 4, nn 10-45 and accompanying text.

¹⁷ This has been confirmed on numerous occasions. See, for example *R v Davison* (1954) 90 CLR 353, 386 (Dixon CJ and McTiernan J); *R v Trade Practices Tribunal*; *Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 398-99 (Windeyer J).

¹⁸ Zines, above n 10, 220.

Implied Incidental Functions

Every conferral of power in the Constitution carries with it those implied incidental powers necessary to exercise that power. This convention derives from English and American principles of constitutional interpretation.¹⁹ In *Barton v Taylor*, the Privy Council stated that whatever ‘in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority’.²⁰ Similarly, in *Le Mesurier v Connor*, Knox CJ, Rich and Dixon JJ explained that:

The principle that everything which is incidental to the main purpose of a power is contained within the grant itself, is so firmly established and so well understood in English law that it would have been superfluous to incorporate it in an express provision of the Constitution.²¹

In the context of judicial power, Patrick Lane has explained that incidental ‘powers will be in themselves innominate powers ... or, at all events, will not be essentially non-judicial powers’.²² There is some debate as to whether functions may be properly classified as ‘innominate’, and this debate is considered in more detail below. That incidental powers may not be ‘essentially non-judicial’ in nature, however, reflects the outcome of a series of High Court judgments prior to and including the *Boilermakers’ Case*. In *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (‘*Lowenstein*’), Latham CJ expressed the view that incidental judicial functions may

¹⁹ Booker, Glass and Watt, above n 10, 60.

²⁰ [1886] AC 197, 293.

²¹ (1929) 42 CLR 481, 497.

²² Patrick Lane, *Lane’s Commentary on the Australian Constitution* (2nd ed 1998) 486.

be vested in federal courts provided that they are not ‘inconsistent with the coexistence of judicial power’.²³ Shortly thereafter, in *Queen Victoria Memorial Hospital v Thornton* (*Thornton*), the full bench of the High Court explained that:

Many functions perhaps may be committed to a court which are not themselves exclusively judicial, that is to say which considered independently might belong to an administrator. But that is because they are not independent functions but form incidents in the exercise of strictly judicial powers.²⁴

On the facts, their Honours considered that the function in question (‘making an appointment in substitution for the appointment made by an employer’)²⁵ was exclusively administrative in nature and could not be carried out judicially. In *Steele v Defence Forces Retirement Benefits Board*, a full court of the High Court once again clarified (in a single judgment), that

what is a bare administrative function cannot be committed to a court. Such a function cannot be committed to a court so to speak in gross as opposed to a thing appurtenant to the performance of a principal judicial duty to which it is an accessory.²⁶

As was noted in the previous Chapter, these decisions were delivered before the incompatibility doctrine had been superseded by the second limb in the *Boilermakers’*

²³ (1938) 59 CLR 556.

²⁴ (1953) 87 CLR 144, 151 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor J).

²⁵ Ibid 150.

²⁶ (1955) 92 CLR 177, 186-87 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ) See also *Seaman’s Union of Australia v Matthews* (1957) 96 CLR 529, 535, where Dixon CJ, Williams, Webb, Kitto and Taylor JJ stated that incidental powers cannot be ‘manifestly and clearly of an arbitral character’.

Case and the second limb fosters a stricter approach to the separation of core judicial and non-judicial functions in federal courts than the incompatibility doctrine. Nevertheless, the *Boilermakers' Case* does not significantly alter the rules governing the vesting of incidental (non-judicial) functions in the judiciary. In essence, the central enquiry is still one of 'compatibility'. According to the majority in the *Boilermakers' Case*:

On more than one occasion of late attempts have been made in judgments of this Court to make it clear that a function which, considered independently, might seem of its own nature to belong to another division of power, yet, in the place it takes in connection with the judicature, falls within the judicial power or what is incidental to it. There are not a few subjects which may be dealt with administratively or submitted to the judicial power without offending against any constitutional precept arising from Chap III.²⁷

As already noted, a power will be non-judicial ('in its essential nature') if it does not satisfy the primary indicia of judicial power. It is no simple matter, however, to determine whether a non-judicial function 'is properly incidental' to the exercise of judicial power. The overarching question in this regard, which has evolved through the High Court's treatment of non-judicial functions, is whether there exists a sufficient nexus between the non-judicial function and the exercise of judicial power. In answering this question, the High Court has taken account of the historical association between the function and the jurisdiction in which it is exercised, the effect of the function in question upon pre-existing rights, and whether that function

²⁷ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 278.

may be performed in accordance with the ‘essential attributes of the curial process’.²⁸ A combination of these three considerations will guide the High Court when determining whether a function is properly to be classified as incidental to the exercise of judicial power. These matters are returned to below. Before doing so, however, it is necessary to deal briefly with the theory of innominate and chameleon powers.

Innominate and Chameleon Functions

Confusion has been added to the rules governing incidental functions by the recognition of so-called ‘innominate’ and ‘chameleon’ functions; that is to say, functions which are not exclusively judicial, legislative or executive, and which it is within the power of the legislature to categorise (in the case of innominate functions),²⁹ or which acquire the character of the body in which they are invested (in the case of chameleon functions).³⁰ These theories have the potential to obscure the true nature of incidental functions and the rules governing the vesting of those functions in federal courts.

The theory of innominate powers originates in the judgment of Isaacs J in *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (the ‘Second BIO Case’). In His Honour’s view:

²⁸ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607 (Deane J).

²⁹ *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153.

³⁰ *Farbenfabriken Bayer AG v Baya Pharma Pty Ltd* (1959) 101 CLR 652; *R v Quinn; Ex parte Consolidated Foods Ltd* (1977) 138 CLR 1.

[C]ertain ... matters may be subject to no *a priori* exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government. Rules of evidence, the determination of the validity of parliamentary elections, or claims to register trade marks would be instances of this class.³¹

Suri Ratnapala has described the proposition that certain powers are innominate as ‘a chimera that evaporates’ when the conceptual errors which underpin it are exposed, and which ‘amounts to an abdication by the High Court of its constitutional responsibility to classify functions and to confine them to the appropriate branch of government’.³² The first conceptual error relates to the difference between the concept of judicial power and the rules of separation (the concept/rule dichotomy).³³ In *Thornton and R v Davison*, Suri Ratnapala argues, the High Court ‘was not saying that these powers were innominate, but were recognising that the Constitution does not preclude Chapter III courts from making orders incidental to the effective performance of their judicial functions’.³⁴ The reason why the power to determine the validity of parliamentary elections (which is inherently judicial) resides in Parliament, is because s 47 of the Constitution explicitly vests that power in Parliament. It is not, as Isaacs J stated, because the power is innominate. This distinction is manifest in the writings of Westel Willoughby, upon whose account the High Court based their theory of incidental powers in the *Boilermakers’ Case*:

[T]he propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is executive,

³¹ (1926) 38 CLR 153, 178-79.

³² Ratnapala, above n 10, 137.

³³ Ibid.

³⁴ Ibid 138.

legislative or judicial, but whether it has been specifically vested by the Constitution in that department, or whether it is properly incidental to the performance of the appropriate functions of the department into whose hands its exercise has been given.³⁵

The second misconception is the difference between subject and function (the ‘subject/function dichotomy’),³⁶ and it is this misconception which is of particular relevance presently. Suri Ratnapala reasons that, in ‘the constitutional context, “function” refers to the mode by which a subject of the law is treated. So it makes no sense to speak of an innominate “function.”’³⁷ Put differently, the Constitution views the word ‘function’ as a verb, and the word ‘subject’ as a noun. Only subjects can be ‘innominate’, because the function is inherent to the nature of the power exercised (e.g. judges do things *judicially*). In *R v Quinn; Ex parte Consolidated Foods* (*R v Quinn*), he argues, the High Court confused subject and function by finding that the power to deregister a trade mark was innominate. Since the power to deregister trade marks is clearly a function and not a subject (because it describes what courts are to *do* in relation to the ‘subject’ (trademarks)), their Honours meant that any branch of government may carry out this function. This is ‘a logical impossibility:’

If by ‘power’ the Court meant the ‘subject’ aspect of power, the decisions are stating the obvious. All subjects are innominate in the sense that they can be dealt with legislatively, executively or judicially. But that is not what the Court meant. The Court suggested that the functions in question are

³⁵ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 278-79; citing Westel Woodbury Willoughby, *Constitutional Law of the United States* (2nd ed 1929), 1620.

³⁶ Ratnapala, above n 10, 138.

³⁷ *Ibid.*

innominate – hence capable of being entrusted to any one of the three great branches.³⁸

There is, however, an important difference between functions which are inherently executive, legislative or judicial in the sense that they require the determination of a subject in the manner of the relevant branch of government, and functions which simply affect the process to be adopted prior to that determination. The ‘functions’ identified in the *Second BIO Case* and *R v Quinn* relate to the manner in which Courts determine the relevant subject and, as Suri Ratnapala points out, such functions cannot be innominate. There are numerous functions, however, which have no bearing upon decision-making and which do not therefore fall within the range of functions necessarily exclusive to the executive, legislature or judiciary. When, in *R v Davison*, Dixon and McTiernan JJ expressed the view that certain powers have a ‘double aspect’, they were not suggesting that the judiciary may determine rights in the manner of the executive or legislature. Rather, their Honours were pointing out that just because ‘a thing may be done in the course of the exercise of judicial power is not to say that it may not be done without the exercise of judicial power’.³⁹

Once the misconceptions outlined above are accepted, the theory of chameleon powers (which derives from the theory of innominate powers)⁴⁰ becomes redundant in a Ch III context. It goes without saying that many non-determinative functions are, in a sense, chameleon-like. According to Windeyer J, for example; ‘an incidental and preliminary enquiry takes its character, for relevant purposes, from the character of

³⁸ Ratnapala, above n 10, 139.

³⁹ *R v Davison* (1954) 90 CLR 353, 368.

⁴⁰ *R v Quinn; Ex parte Consolidated Foods* (1977) 138 CLR 8 (Jacobs J).

the jurisdiction of which it is a phase.⁴¹ However, and as discussed in more detail below, the fact that such functions have been validly vested in federal courts can be explained within the rules governing implied incidental functions, and the presumptions of statutory interpretation applied to that end. To say that a function is innominate or chameleon-like, therefore, is simply to say that it may be ‘impliedly incidental’. In any event, there do not appear to be any instances of powers which are administrative in nature being vested in a court on the basis that they have a chameleon-like quality.⁴² As Hayne J recently commented in *Thomas v Mowbray*, ‘the chameleon doctrine does not mean that *Boilermakers* “does not matter much any more.” There remains a real and radical difference between the judicial power of the Commonwealth and executive and legislative power’.⁴³

Historical association between function and jurisdiction

A number of differing approaches to the definition of judicial power can be isolated from case law. Patrick Keyzer identifies three ‘relatively distinct approaches’⁴⁴ - historical,⁴⁵ analytical⁴⁶ and functional⁴⁷ - but is careful not to overstate their exclusivity as, in his words, ‘multiple approaches may be adopted in any particular case’.⁴⁸ Leslie Zines acknowledges that various approaches have been adopted to define judicial power, but suggests that the historical approach plays an overarching, or predominant role:

⁴¹ *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 399.

⁴² Ratnapala, above n 10, 139.

⁴³ *Thomas v Mowbray* (2007) 233 CLR 307, 467 [472]. See also 426-428 [340]-[344] (Kirby J).

⁴⁴ Patrick Keyzer, ‘Constitutional Law’, (2nd ed, 2005) 252.

⁴⁵ ‘[W]hich emphasises the utility of historical and traditional understandings of judicial power’. Ibid.

⁴⁶ ‘[W]hich emphasises what are regarded to be the essential characteristics of judicial-decision-making that distinguish it from other types of decision-making’. Ibid.

⁴⁷ ‘[W]hich emphasises that some types of activities are common to courts and non-judicial tribunals, and so the discriminating feature is whether the relevant powers have been (and can be) vested in a court. Ibid.

⁴⁸ Ibid.

In these matters the courts have been guided largely by history; the values involved in the separation of powers and by social policy, as well as by strict analysis. Indeed, in a sense, the concept of judicial power ... is itself derived from historical examination, that is, what the courts have done.⁴⁹

In addition to determining which functions are ‘exclusively’ judicial in nature, the historic approach has been applied in ‘cases where the power in dispute hovers between a judicial and non-judicial appellation’.⁵⁰ Indeed, with few exceptions the functions which the High Court has classified as incidental have possessed some historical association with the judicial process. In the leading case on the matter, *R v Davison*, Dixon CJ and McTiernan J identified various powers as established incidents in the exercise of judicial power. Of the functions identified by their Honours, only one (the administration of enemy property) did not possess an historic association with the exercise of judicial power. The functions identified were:

1. The making of procedural rules of court.
2. The administration of trusts in the absence of a dispute between parties or the adjudication of rights.
3. The maintenance and guardianship of infants.
4. Consent to marriage of a ward of court.
5. The exercise of a power of sale.
6. The administration of enemy property.
7. Various insolvency orders.

⁴⁹ Zines, above n 10, 221.

⁵⁰ Enid Campbell and H.P. Lee, *The Australian Judiciary* (2001) 40.

8. Grants of probate.⁵¹

In the same case, Kitto J explained that if a function has traditionally fallen to the judiciary to perform, it will ordinarily be conclusive of that function's suitability for judicial performance:

Where the action to be taken is of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it.⁵²

Subsequent authorities confirm the centrality of historic considerations in the determination of incidental powers.⁵³ In *Cominos v Cominos*, the High Court held unanimously that the power to make discretionary orders was incidental to the exercise of judicial power in relation to matrimonial proceedings principally (although not exclusively) because of the historic association between similar orders and matrimonial proceedings. As McTiernan and Menzies JJ explained,

it is a recognised part of judicial power to make orders of the sort authorized by the sections in question in the exercise of judicial power to hear and

⁵¹ *R v Davison* (1954) 90 CLR 353, 368-69.

⁵² *Ibid* 382.

⁵³ In *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 167, a near identically constituted High Court to that in *R v Davison* (Williams J replacing Webb J) placed particular emphasis on historical considerations when faced with a challenge to the long standing power of the Senate and House of Representatives to determine and punish contempt of Parliament. In that instance, the Court considered that the power had not historically been treated as strictly judicial, but rather 'as proper incidents of the legislative function'.

determine matrimonial causes. The powers conferred by the sections are ancillary too, and take their colour from, the valid grant of jurisdiction to hear and determine matrimonial causes.⁵⁴

Walsh J agreed, noting that, in ‘considering the powers conferred by [the discretions in question], it is necessary to have regard to the jurisdiction which the court has been given,’⁵⁵ and Gibbs J stated that ‘the power is ... exercised as an incident to judicial proceedings’.⁵⁶ Mason J concluded that

the decisive consideration [is] that an award of maintenance has been traditionally made as the consequence of a curial process, by way of an order granting a form of relief which is ancillary to the principal relief sought ... [viz.] ... a decree for the dissolution of marriage. An order for maintenance is made in consequence or in contemplation of the granting of that principal relief. It forms part of the totality of the orders made in the course of a curial procedure.⁵⁷

Committal proceedings have also been held to constitute an incidental function because they have traditionally been conducted by the judiciary.⁵⁸ In *Huddart v Parker*, Griffith CJ concluded that committal proceedings were non-judicial in nature because they merely constituted ‘a preliminary step’ in the curial process, and that this step was traditionally carried out by the executive.⁵⁹ On the facts, His Honour

⁵⁴ (1972) 127 CLR 588, 591.

⁵⁵ Ibid 503.

⁵⁶ Ibid. Stephens J agreed that the power related to judicial power, but did not expressly categorise that power as incidental.

⁵⁷ *Cominos v Cominos* (1972) 127 CLR 588, 608.

⁵⁸ While this thesis is not directly concerned with the criminal jurisdiction, the reasoning applied by the High Court in this regard extends to other Ch IIII jurisdictions.

⁵⁹ (1909) 8 CLR 330, 357.

was not directly concerned with the role of courts in committal proceedings, but, rather, with whether powers analogous to committal proceedings could be vested in the Comptroller-General (a non-judicial body) in accordance with the first limb of the separation doctrine.⁶⁰

In *Pearce v Cocchiaro* ('*Pearce*'), the High Court confirmed that committal proceedings constituted an exercise of incidental judicial power for the purposes of the second limb of the separation doctrine.⁶¹ The challenge in *Pearce* was to a statutory provision of the *Bankruptcy Act 1966*, which purported to confer a power upon special magistrates to determine certain offences summarily during committal proceedings.⁶² The provision was attacked on the basis that, as committal proceedings were a non-judicial function, they could not be reposed in a court of summary jurisdiction. Having established that special magistrates constituted a 'court' for the purposes of Ch III, Gibbs J (with whom Stephens, Jacobs and Aickin JJ agreed) concluded that:

In so far as the sub-section confers on the special magistrate power of a non-judicial kind [*viz.* the carrying out of committal proceedings] ... it is a valid law in respect to those matters in relation to which the Parliament may create criminal offences.⁶³

According to the majority, therefore, committal proceedings could be vested in the special magistrates (under s 51 (xvii)) because those proceedings were historically

⁶⁰ The High Court confirmed that committal proceedings do not constitute an exercise of judicial power in *Ammann v Wegener* (1972) 129 CLR 415, 435-436. Once again, however, the decision turned upon whether committal proceedings were exclusive to Federal courts.

⁶¹ (1977) 137 CLR 600.

⁶² *Bankruptcy Act 1966*, s 273 (2)

⁶³ (1977) 137 CLR 600, 609 (Gibbs CJ; Stephen Jacobs and Aickin JJ in agreement).

incidental to the determination of summary offences, and this jurisdiction was validly vested by virtue of s 77 (iii). In *R v Murphy* the High Court was asked to determine whether committal proceedings could be vested in the Supreme Court of NSW when exercising Commonwealth judicial power. In a lengthy statement (which it is worth reproducing in its entirety) the full court of the High Court stated that, although

the relationship between committal proceedings and the trial of an indictable offence is such that they are part of the matter which the trial ultimately determines, we are also, perhaps necessarily, of the view that the relationship is such that to make provision for the conduct of committal proceedings is incidental to the investing of a State court with jurisdiction to try an indictable offence against a law of the Commonwealth. ... The hearing of committal proceedings in respect of indictable offences by an inferior court is a function which is *sui generis*. Traditionally, committal proceedings have been regarded as non-judicial on the ground that they do not result in a binding determination of rights. At the same time they have a distinctive judicial character because they are curial proceedings in which the magistrate or justices constituting the court is or are bound to act judicially and because they affect the interests of the person charged. The procedure followed on the hearing of committal proceedings is similar to that followed on the hearing of judicial proceedings ... Even though they are properly to be regarded as non-judicial in character, committal proceedings themselves traditionally constitute the first step in the curial process, possibly culminating in the presentation of the indictment and trial by jury. They have the closest, if not an essential, connection with an actual exercise of judicial power.⁶⁴

⁶⁴ (1985) 158 CLR 596, 614-16.

The fact that historical considerations have been highly influential in the High Court's classification of incidental functions need not be laboured any further.⁶⁵ If some manner of historical connection were pre-requisite to the vesting of incidental functions in federal courts, this would not 'bode well for the acceptance of mediations as a permissible exercise of non-judicial power'.⁶⁶ Mediation is not *sui generis* in the sense that committal proceedings are. However, as noted above, whether the courts have historically carried out a given function is but one of the considerations to be taken into account when determining whether it may be vested in a federal court. The judicial process invariably changes over time or there would be no need for the established incidental power of courts to determine rules of court. Moreover, if courts could only 'do' what courts 'have done' the judicial role would be frozen in time, and Parliament's legislative power under ss 51 (xxiv) and (xxxix) (and the federal judiciary's delegated power under the latter) would be undermined. Despite the central role of legal history in the determination of judicial power, therefore, it cannot be the sole determinant of it. Indeed, according to Deane, Dawson, Gaudron and McHugh JJ, to adopt a purely historical approach to the determination of judicial power would 'be to place reliance upon the elements of history and policy which, whilst they are legitimate concerns, cannot be conclusive'.⁶⁷ Likewise, in *R v Joske; Ex parte Shop Distributive & Allied Employees Association*, Mason and Murphy J stated that:⁶⁸

⁶⁵ For a recent example of the continued emphasis placed on historical considerations, however, see *Thomas v Mowbray* (2007) 233 CLR 307, [16] (Gleeson CJ), [79] (Gummow and Crennan JJ), [595] (Callinan J).

⁶⁶ Phillip Tucker, 'Judges as mediators: A Chapter III Prohibition?' (2000) 11 *Australian Dispute Resolution Journal* 84, 88. Although this statement was made in relation to the functions that may be vested in Judges in their private capacity, it is equally applicable in the current context.

⁶⁷ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267.

⁶⁸ (1976) 135 CLR 194.

It is no objection that the function entrusted to the Court is novel and that the Court cannot in exercising its discretion call in aid standards elaborated and refined in past decision; it is for the Court to develop and elaborate criteria regulating the discretion.⁶⁹

There is no reason in principle therefore, why a function which is not historically associated with the exercise of judicial power cannot be vested in a Ch III court, provided that it does not require that court to act in a non-judicial manner (a functional and analytical enquiry). This may occur if courts are involved in the creation of new rights, or by undermining the essential attributes of the curial process (the 'judicial process' implication).⁷⁰ The particular importance attached to the former consideration vis-à-vis the historical legal approach was highlighted by Jacob J in *R v Quinn*;

the course of legislation in comparatively recent times does not, in itself, provide a foundation for the historical legal approach. If the legislation requires the exercise of a power to determine questions the determination of which will affect what are traditionally regarded as basic legal rights, the judicial nature of the power springs from the effect which the exercise of the decision-making function under the legislation will have on legal rights

⁶⁹ (1976) 135 CLR 194, 216. See also McTiernan J at 202, who stated that the function was 'of a judicial nature or incidental to the exercise of judicial power', and Mason and Murphy JJ at 216 who concluded that the 'exercise of the power given ... if not in itself an exercise of judicial power (which in our opinion it is), is incidental to proceedings for a declaration of invalidity'.

⁷⁰ As noted in the following Chapter, the judicial process implication has evolved primarily in a procedural fairness context. There is some debate as to whether or not certain substantive rights are also protected by the due process component of the implication. See Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the new High Court' (2004) 32 Federal Law Review 205; Justice Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as Well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235. However, recent authority suggests that the High Court has little interest in extending this limb of the due process component: *APLA Ltd v Legal Services Commissioner* (2006) 224 CLR 322, [217] (Gummow J); *Thomas v Mowbray* (2007) 233 CLR 307, [111] (Gummow and Crennan JJ).

rather than from the history of similar legislation reposing the function in a judicial tribunal.⁷¹

The principle that judicial power may only be exercised to determine existing rights, and its implications (if any) for judicial mediation, are considered in detail below. The judicial process implication is the subject of Chapter 4.

Is Mediation an Incidental Judicial Function?

The following part of this Chapter examines the primary indicia in more detail. It is conceded that mediation cannot be classified as an exclusively judicial function (because it does not result in a binding determination of rights), and that it must therefore be classified as a non-judicial function. However, it is argued that the power to mediate may nevertheless be vested in a Ch III court as an incidental judicial function (provided that it is not an exclusively executive or legislative function). Since mediation is unlikely to affect substantive rights, it is concluded that the critical question is whether judicial mediation can be carried out in accordance with ‘the essential character of a court [and] with the nature of judicial power.’⁷²

An Existing Controversy

In *Re Judiciary*, it will be recalled,⁷³ Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ held that the High Court could not provide advisory opinions - despite the fact that their Honours considered such opinions to be a judicial function - because they were

⁷¹ (1977) 138 CLR 1, 12.

⁷² *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan Deane and Dawson JJ).

⁷³ See above Chapter 2 n 126 and accompanying text.

not a ‘matter’ in respect of which Commonwealth judicial power could be exercised.⁷⁴ This was because, ‘there can be no matter within the meaning of the section [s76] unless there is some immediate right, duty or liability to be established by the determination of the Court’.⁷⁵ To this may be added the rule that courts may not actively seek out disputes in the manner of inquisitors, but must wait until ‘called upon to take action’.⁷⁶

Generally speaking a controversy will involve at least two disputants, although there are exceptions. Strictly speaking, for example, child-related proceedings under Pt. VII of the *Family Law Act 1975* involve an investigation into the best interests of the child as opposed to the resolution of a dispute between parties *per se*.⁷⁷ Other functions which do not involve the resolution of an existing controversy between two parties have been successfully vested in federal courts on the basis that they have historically fallen to the judiciary. As discussed above, however, these exceptions are best explained on the basis that they are incidental to the exercise of judicial power.

As judicial mediation does not affect the manner in which disputes are initially brought before the courts, it satisfies this aspect of judicial power.⁷⁸ Applying Griffith

⁷⁴ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.

⁷⁵ *Ibid* 265.

⁷⁶ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

⁷⁷ The status of Commonwealth child-related proceedings is highly debatable. According to Anthony Dickie, Part VII of the *Family Law Act 1975* provides the Commonwealth with powers to ‘make an order relating to the “welfare” of children ... [that is] ... virtually equivalent to the power possessed by a Supreme Court pursuant to its *parens patriae* jurisdiction’. Anthony Dickie, *Family Law* (4th ed 2002) 395. However, the powers provided by Part VII power are limited and flow from statute – not the Constitution. Given that implied procedural rights are attached to judicial power, it may not be accurate to say that child-related proceedings do not involve the resolution of a controversy between two parties.

⁷⁸ The LAT process may be an exception to this rule, as child-related proceedings do not strictly speaking involve a dispute between parties. However, it can hardly be doubted that child-related proceedings constitute ‘matters’ under Ch III.

CJ's definition of judicial power, the next issue is how, if at all, judicial mediation will affect the power of a court to issue a binding and authoritative decision.⁷⁹

An Authoritative, Binding and Conclusive Determination

The terms 'authoritative', 'binding' and 'conclusive' are interchangeable,⁸⁰ and 'encompass three qualities of a judicial decision':

1. the doctrine of *res judicata* (matters cannot be litigated twice by the same parties),
2. the doctrine of *functus officio* (judges cannot reopen the same case except in very limited circumstances),
3. the doctrine of collateral attack (a decision made within jurisdiction cannot be challenged in collateral proceedings - as opposed to a direct attack by way of appeal etc).⁸¹

In addition, the High Court has confirmed that a decision cannot be subject to a complete *de novo* hearing before it can be enforced.⁸² Brennan J (as then was) has justified the requirement that judicial power be exercised to produce a binding decision on the basis that:

⁷⁹ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

⁸⁰ Gabriel Moens' and John Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia: Annotated* (6th ed 2001), 233.

⁸¹ Ratnapala, above n 10, 129-34.

⁸² *Federal Commissioner of Taxation v Munro British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153.

Both public policy and the interests of the litigants require that there should be an end to litigation as to a particular subject matter once a judgment determining the rights and liabilities of the parties as to that matter has been recovered.⁸³

How, then, are the various prehearing processes which courts frequently engage in to be classified according to this core element of judicial power? The following section demonstrates that these functions constitute discrete steps, or ‘incidents’, in the litigation process.

Prehearing Functions?

In the US, judicial power is defined by Article III, and has been restricted by the Supreme Court to ‘the trial and determination of cases’.⁸⁴ Matters such as the taking of affidavits, arresting individuals and committing those individuals for trial are not an exercise of judicial power because they do not result in a binding determination of rights.⁸⁵ The situation in Australia is effectively the same. As Patrick Lane has explained, when determining whether a power is judicial, ‘one looks at the decision, rather than the process to get there’.⁸⁶ Windeyer J made the same point in the *Tasmanian Breweries* case:

⁸³ *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 609, citing *Lockyer v Ferryman* (1877) LR 2 AC 519.

⁸⁴ *Robertson v Baldwin*, 165 US 275, 279 (1897).

⁸⁵ Ibid. According to Justice Brown, the definition of judicial power in Art III extends ‘only to the trial and determination of “cases” in courts of record ... [but] ... Congress is still at liberty to authorize the judicial officers of the several States to exercise such power as is ordinarily given to officers of courts not of record – such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power, rather than a part of the judicial power itself’.

⁸⁶ Lane, above n 22, 467.

An exercise of judicial power, in the relevant sense, obviously means more than mere adjudication ... Duties of adjudication may be incidental to administrative tasks which are performed as part of the executive power of government ... *But that does not mean that [the executive] ... are exercising the judicial power. That only occurs at the final stage of the process.*⁸⁷

Because a function must yield a binding decision to be considered ‘exclusively judicial’, prehearing functions are invariably non-judicial. This was the reasoning applied in *Pearce* and *Murphy*, as discussed above, with the result that committal proceedings are considered non-judicial in nature despite the fact that they do, in a sense, determine rights and interests. As a prehearing function which does not determine rights in any sense, mediation is *ipso facto* non-judicial.⁸⁸

However, the fact that mediation is non-determinative does not have any bearing upon whether the power to mediate may be vested in the judiciary as an incidental function. It is the capacity to make a binding determination that must exist in a judicial tribunal – not the making of a binding determination as such. Parties have always been free to settle during trial proceedings. A settlement agreement is enforced as a consent order issued by the court, thus the objectives of the doctrines of *res judicata*, *functus officio* and collateral attack are still satisfied. Not only may judicial power be exercised in proceedings which result in non-adjudicated settlements, such outcomes are generally preferred to the provision of a binding determination.⁸⁹ As discussed in Chapter I,

⁸⁷ *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 398 (emphasis added).

⁸⁸ Various commentators have reached the same conclusion. See Tucker, above n 66, 89; Justice Michael Moore, ‘Judges as Mediators: A Chapter III Prohibition or Accommodation?’ (2003) 14 *Australian Dispute Resolution Journal* 188; David Spencer, ‘Judicial Mediators: Is the time right? – Part 1’ (2006) 17 *ADRJ* 130, 135.

⁸⁹ Laurence Boulle, *Mediation: Principles Process Practice* (2005) 165.

modern case management systems are designed to encourage settlement as early as possible in the trial process, and various high profile judges have expressed their preference for negotiated outcomes whenever possible.⁹⁰

A related question, which it is convenient to address at this stage, is whether judicial mediation might unconstitutionally interfere with the appellate jurisdiction of the High Court. In *Mellifont v Attorney General of Queensland* ('*Mellifont*'), Mason CJ, Deane, Dawson, Gaudron and McHugh JJ stated that:

In conformity with the general principle that an appeal does not lie from a decision made otherwise than in the exercise of judicial power, it has been held that, interlocutory orders aside, an appeal will not lie under s73 from a decision which does not finally determine the parties' rights and obligations in controversy.⁹¹

At first glance, this passage might be taken to suggest that no appeal will lie from a successful judicial mediation, because no final decision will have been made by the judge. However, and as the majority pointed out in *Mellifont*,⁹² s 73 of the Constitution provides an appellate jurisdiction in respect of 'all judgments, decrees, orders, and sentences'. Any settlement reached by the parties during judicial mediation will be enforced as a consent order, and a right of appeal will therefore lie to the High Court. Of course, there is unlikely to be any basis on which to seek an

⁹⁰ See, for example, *Kewside Pty Ltd v Warman International Ltd* [1990] ATPR 46-059, 102 (French J); *Hemmes Hermitage Pty Ltd v Abdurahmann* (1991) NSWLR 343 (Kirby J).

⁹¹ Citing *Smith v Mann* (1932) 47 CLR 426, at 445-446; *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273, at 277-279, 281, 285-287, 288-292; *Yule v Junek* (1978) 139 CLR 1, at 14; *Fisher v Fisher* (1986) 161 CLR 438, at 450; *Swiss Aluminium Australia Ltd v Federal Commissioner of Taxation* (1987) 163 CLR 421, at 425.

⁹² *Mellifont v A-G (Qld)* (1991) 173 CLR 289, 300.

appeal (unless there has been a manifest breach of procedural fairness), but this does not undermine s 73.⁹³

The only remaining question (in order to satisfy the primary indicia) is whether mediation involves the creation of new rights. Ch III courts apply rights, they do not create them. Thus (applying a strict separation of powers), the creation of new rights is not ‘judicial’. This aspect of the primary indicia overlaps with the ‘judicial process’ implication addressed in the following Chapter, as both take account of the manner in which judicial power is exercised.

Pre-Existing Rights

The notion that judicial power may only be exercised to determine existing rights, and cannot be invoked to create new rights, is an underlying assumption of the common law judicial model. For ease of reference, it is convenient to refer to this limitation as the ‘existing rights’ principle. In *Blackburn, Low & Co v Vigors*, Lord McNaughten expressed his belief that, ‘it is not the function of a Court of justice to enforce or give effect to moral obligations which do not carry with them legal or equitable rights.’⁹⁴ Similarly, in *Waterside Workers' Federation of Australia v JW Alexander*, Isaacs and Rich JJ recognised that, a ‘court of law has no power to give effect to any but rights recognized by law’.⁹⁵ This can be contrasted with arbitral tribunals, their Honours’ explained, because arbitral tribunals determine:

⁹³ Philip Tucker has also pointed out that it may be ‘effectively impossible for ... appellants to adduce sufficient evidence to sustain their case’. This danger is examined in Chapter 8. Above n 66, 90.

⁹⁴ (1887) 12 QBD 531.

⁹⁵ (1918) 25 CLR 434, 464.

a claim by one of the disputants that existing relations should be altered, and by the other that the claim should not be conceded. It is therefore a claim for new rights. And the duty of the arbitrator is to determine whether the new rights ought to be conceded in whole or in part ... But his declaration of opinion does not make it law. He does not legislate. It is always the State which gives the arbitrators opinion efficacy, and stamps his decision with the character of a legal right or obligation.⁹⁶

The tension between legal realism and Griffith CJ's definition of judicial power is obvious,⁹⁷ but even if legal discretions do effectively allow judges to 'make law' this does not necessarily undermine the idea that judges should only determine existing rights. What this requirement 'excludes from the concept of judicial power is the authority to resolve matters of legal right in the manner of legislative and administrative bodies'.⁹⁸ Discretionary powers may involve judges in law making, but it is law making restricted by due process and limited by the facts of the cases presented before the court.⁹⁹

Nevertheless, as the consideration of 'policy' is ordinarily a legislative and/or executive function, functions which create new rights by reference to policy concerns are liable to undermine the second limb of the separation doctrine. In *Precision Data Holdings Ltd v Wills* ('*Precision Data*'), a full court of the High Court stated that:

⁹⁶ *Waterside Workers' Federation of Australia v JW Alexander* (1918) 25 CLR 434, 464.

⁹⁷ Legal realists argue that legal decisions cannot be reached by the application of existing legal rights alone, because a number of equally legitimate outcomes can be generated in disputes by recourse to the same general principles. According to Roberto Unger, for example, the legalist/formalism argument is stymied by 'a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary. Though such conflicts may not be entirely bereft of criteria, they fall far short of the rationality that the formalist claims for legal analysis'. Roberto Unger, *Law in Modern Society* (1976), 561.

⁹⁸ Ratnapala, above n 10, 128. See also Zines, above n 10, 254.

⁹⁹ *Ibid.*

Functions may be classified as either judicial or administrative according to the way in which they are to be exercised. So, if the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also, then the determination does not proceed from any exercise of judicial power. That is not to suggest that considerations of policy do not play a role, sometimes a decisive role, in the shaping of legal principles ... Furthermore, if the object of the adjudication is not to resolve a dispute about the existing rights and obligations of the parties by determining what those rights and obligations are but to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power.¹⁰⁰

As Lumb and Moens explain, generally ‘speaking, the wider the discretion the more likely it is that the power conferred upon the body will be treated as a power to create new rights (that is, as constitutive and not interpretative)’.¹⁰¹ This proposition accords with the view expressed by Dixon CJ, McTiernan, Kitto and Taylor JJ stated in *R v Spicer; Ex parte Australian Builders’ Labourers’ Federation* (*‘R v Spicer’*):

The existence of some judicial discretion to apply or withhold the appointed legal remedy is not necessarily inconsistent with the determination of such a matter in the exercise of the judicial power of the Commonwealth. But it is perhaps necessary to add that the discretion must

¹⁰⁰ (1991) 173 CLR 167, 189.

¹⁰¹ Moens’ and Trone, above n 80, 535.

not be of an arbitrary kind and must be governed or bounded by some ascertainable tests or standards.¹⁰²

As might be expected, the earliest cases to consider the existing rights principle arose in the context of the first limb of the separation doctrine. In *Silk Brothers Ltd v The State Electricity Commission of Victoria*,¹⁰³ the High Court held that the power vested in judicial tribunals to fix fair rents was not an exercise of judicial power (despite the fact that the decision was based on an existing controversy and binding in nature) because it required a consideration of broad economic policy factors - ergo the creation new rights (the right to receive a higher rent).

In *R v Spicer*, a majority of the High Court held that a power purportedly granted to the Industrial Court to disallow ‘any rule of an organisation which, in the opinion of the court’ was, inter alia, ‘tyrannical or oppressive’ or imposed ‘unreasonable conditions upon the membership of any member or upon any applicant for membership,’¹⁰⁴ attempted to vest in the Court a discretion which could not be carried out in a judicial manner. In the opinion of Dixon J (as he then was), the criteria involved were, ‘vague and general and give much more the impression of an attempt to afford some guidance in the exercise of what one may call an industrial discretion than to provide a legal standard governing a judicial discretion’.¹⁰⁵ The discretion was therefore invalid under the second limb of the separation doctrine, because the ‘consideration ... of industrial policy’¹⁰⁶ is an executive or legislative function.

¹⁰² (1957) 100 CLR 312, 317.

¹⁰³ (1943) 67 CLR 1.

¹⁰⁴ *Conciliation and Arbitration Act 1904*, s 140.

¹⁰⁵ *R v Spicer* (1957) 100 CLR 277, 290 (see also Kitto J at 306).

¹⁰⁶ *R v Spicer* (1957) 100 CLR 277, 310 (Taylor J).

Again, in the *Tasmanian Breweries* case, a majority of the High Court held that the discretionary power purportedly granted by the *Trade Practices Act 1965* to determine whether a trade practice or restriction was contrary to ‘the public interest’, could not be vested in a federal court as an incident in the exercise of judicial power. With reference to the limitations outlined in *R v Spicer* (above), Windeyer J explained that the ‘public interest is a concept which attracts indefinite considerations of policy that are more appropriate to law-making than to adjudication according to existing law’.¹⁰⁷

The Presumption in favour of legislative validity

In recent years, however, the existing rights principle ‘has not proved to be a great restriction on [Parliament’s] ... power to confer functions on Courts’.¹⁰⁸ This is partly because, when determining whether a statutory discretion is governed by ‘ascertainable tests or standards’, the courts will assume that Parliament did not intend to exceed its legislative powers. Put differently, they will ‘read down’ legislation so as to afford it an interpretation that accords with the requirements of Ch III. As Isaacs J explained in *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation*;

It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim *Ut res magis valeat quam pereat* [in order that the thing might rather have effect than it be destroyed]. Nullification and confusion of public business are not lightly to be ignored...There is always an initial presumption that Parliament did not

¹⁰⁷ *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 400.

¹⁰⁸ Zines, above n 10, 251.

intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail.¹⁰⁹

Likewise, in *Attorney-General (Victoria) v The Commonwealth*, Dixon J warned that:

In discharging our duty of passing upon the validity of an enactment, we should make every reasonable intendment in its favour. We should give to the powers conferred upon the Parliament as ample an application as the expressed intention and the recognised implications of the Constitution will allow. We should interpret the enactment, so far as its language permits, so as to bring it within the application of those powers and we should not, unless the intention is clear, read it as exceeding them.¹¹⁰

Closely connected to (but distinct from) this presumption is the notion that the judiciary should only decide constitutional questions when necessary on the facts. As Higgins J stated in *Attorney-General (NSW) v Brewery Employees' Union (NSW)*:

Nothing would tend to detract from the influence and the usefulness of this Court more than the appearance of an eagerness to sit in judgment on Acts of Parliament, and to stamp the Constitution with the impress which we wish it to bear. It is only when we cannot do justice, in an action properly brought,

¹⁰⁹ (1926) 38 CLR 153, 180.

¹¹⁰ (1945) 71 CLR 237, 267.

without deciding as to the validity of the Act, that we are entitled to take out this last weapon from our armoury.¹¹¹

As will be seen, the presumption in favour of legislative validity has facilitated the development of the *persona designata* doctrine, on the one hand, and diluted the application of the judicial process implication and the *Kable* doctrine, on the other. However, it would be wrong to conclude that the High Court is somehow bound by this approach. Effective power separation requires an examination of substance as well as form, especially when individual rights and liberties are at stake.¹¹² Brennan CJ, McHugh, Gummow and Kirby JJ made this point in *Ha v New South Wales*:

When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms in order to ensure that the limitation or restriction is not circumvented by mere drafting devices.¹¹³

The relationship between literal and purposive interpretive approaches is explored in more detail in the following Chapters. It is uncontroversial to state, however, that the former has dominated the High Court's treatment of the existing rights principle. In *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australia Section*, discretionary powers guided by the Courts own view as to what

¹¹¹ (1908) 6 CLR 469, 590. See also: *Lambert v Weichelt* (1954) 28 ALJR 282, 283 (Dixon CJ), *Cheng v The Queen* (2000) 203 CLR 248, 270 [58] (Gleeson CJ, Gummow and Hayne JJ), *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 473-474 (Gummow and Hayne).

¹¹² *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27. (Brennan, Deane and Dawson JJ).

¹¹³ (1997) 189 CLR 465, 498. Even judges noted for their tendency towards legalism have strayed from the presumption in favour of validity to achieve a desired outcome. See, for example, *XYZ v The Commonwealth* (2006) 227 CLR 532, 591-595 [174]-[180] (Callinan and Heydon JJ).

was ‘oppressive’, ‘unreasonable’ or ‘unjust’, were considered to be capable of ‘strictly judicial application’ despite the fact that these criteria were ‘more readily ... associated with administrative rather than judicial discretions’.¹¹⁴ Likewise, in *R v Joske; Ex parte Australian Building Construction Employees and Builder’s Labourers’ Federation*, the discretionary power to invalidate rules of an organisation which were ‘oppressive, unreasonable and unjust’¹¹⁵ was considered by Barwick CJ to be ‘eminently suitable’ criteria for judicial application.¹¹⁶ Again, in *Cominos v Cominos*, the High Court held that the discretionary power of the Court to make such orders as ‘it thinks proper’ and as are ‘just and equitable’, were ‘not so indefinite as to be susceptible of strictly judicial application’.¹¹⁷ The discretionary power examined in *Cominos v Cominos* can be seen to encompass both substantive and procedural elements, and is considered again in Chapter 4.

Any residual belief that the existing rights principle limits Parliament’s power to vest law-making powers in federal courts has surely evaporated in the wake of the High Court’s ruling in *Thomas v Mowbray*.¹¹⁸ That case concerned the validity of Div 104 of the *Criminal Code* (Cth), which confers upon the Federal Magistrates Court the power to make interim control orders for the home detention of a person suspected or terrorist activity. Section 104.4(1)(c) requires the Court to consider what is ‘reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act’.¹¹⁹ Having established that the provision in question was a valid law under the Commonwealth’s defence and external affairs

¹¹⁴ (1960) 103 CLR 368

¹¹⁵ *Conciliation and Arbitration Act 1904*, s 143

¹¹⁶ (1974) 130 CLR 87, 94.

¹¹⁷ (1972) 127 CLR 588, 599 (Gibbs J).

¹¹⁸ (2007) 233 CLR 307.

¹¹⁹ *Criminal Code Act 1995* (Cth) s 104.4(1)(c), (d).

power,¹²⁰ a majority of the High Court (Kirby and Hayne JJ dissenting) held that the function was capable of judicial application despite the fact, as Kirby J pointed out, that it required the Court to make ‘its decision without the benefit of a stated, pre-existing criterion of law afforded by the legislature’.¹²¹ According to Gleeson CJ:

If, as in the present case, Parliament decides to confer a power on the judicial branch of government, this reflects a parliamentary intention that the power should be exercised judicially, and with the independence and impartiality which should characterise the judicial branch of government ... The power to restrict or interfere with a person's liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done, which involves interfering with legal rights, and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances. It is not intrinsically a power that may be exercised only legislatively, or only administratively.¹²²

It is apparent that the majority view sprang from the perceived desirability of judicial oversight in respect of administrative powers affecting individual liberties. Such oversight, Gleeson CJ explained, should ‘be regarded as a good thing, not something to be avoided’.¹²³ Callinan J similarly pointed out that, were it accepted that the power to issue control orders could not be carried out judicially, this could ‘conceivably

¹²⁰ *Thomas v Mowbray* (2007) 233 CLR 307, 324 [6] (Gleeson CJ), 359-364 [132] – [148] (Gummow and Crennan J), 400 [262] (Kirby J), 459 [444] (Hayne J), 506 [590] (Callinan J), 511 [611], 525 [649] (Heydon J).

¹²¹ *Ibid* 419 [322] (Kirby J).

¹²² *Ibid* 327-28 [15] (Gleeson CJ).

¹²³ *Ibid* 329 [17] (Gleeson CJ). As discussed in Chapter 8, a belief in the benefits brought to certain non-judicial functions by judicial independence and impartiality in matters pertaining to civil rights also led to the development of the person *designata doctrine* (in that instance the issue was the granting of telephone intercept warrants).

produce the consequence that a person in the plaintiff's position might be subjected to a form of administrative detention'.¹²⁴ And, in His Honour's view, risks 'to democracy and to the freedoms of citizens are matters of which courts are likely to have a higher consciousness'.¹²⁵

Academic commentary concerning *Thomas v Mowbray* has focussed principally on the High Court's expansive interpretation of the defence power¹²⁶ and the perceived inability, highlighted by that case, 'of Australian judges to prevent unjust human rights outcomes in the face of federal legislation that is unambiguous in its intent and that falls within a constitutional head of power'.¹²⁷ This has in turn led to renewed calls for the introduction of a bill of rights.¹²⁸ The civil liberties context within which the decision was made should naturally be borne in mind when forecasting the broader implications of *Thomas v Mowbray*, but the decision nevertheless exemplifies the ineffectiveness of the existing rights principle as a limitation upon Parliament's ability to vest broad policy based discretions in courts. According to Paul Fairall and Wendy Lacey:

It is perhaps too easy to state simply that the power to apply *pre-existing* law in order to resolve a dispute between the parties is an expression of judicial power; whilst the power to determine the content of rights and obligations governing particular circumstances *in futuro* is a legislative function. As

¹²⁴ *Thomas v Mowbray* (2007) 233 CLR 307, 506 – 507[592].

¹²⁵ *Ibid* 508 [599].

¹²⁶ Helen Irving, 'The High Court Fails History in *Thomas*' (2007) 45(8) *Law Society Journal* 54, 54.

¹²⁷ Justice Michael McHugh, 'Does Australia Need a Bill of Rights?' (Speech delivered at the New South Wales Bar Association, Sydney, 8 August 2007), 44.

¹²⁸ *Ibid*; Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders Under Federal Law: The Case for a Bill of Rights' (2008) 31 (3) *Melbourne University Law Review* 1072, 1096; John Von Doussa 'Reconciling Human Rights and Counter-Terrorism – A Crucial Challenge' (2006) 13 *James Cook University Law Review* 104, 120-23.

Thomas v Mowbray demonstrates, this formulation does not logically determine whether the power to determine the extent of a control order regime based on an assessment of future risk is a judicial or executive or indeed legislative function.¹²⁹

This assessment tallies with the theory espoused by Kenneth Culp Davis, that all governmental decision-making involves an element of discretion, and that the question is not therefore whether discretionary decision-making should occur, but how much discretion decision-makers should have.¹³⁰ The gradual erosion of the existing rights principle, culminating in *Thomas v Mowbray*, indicates that the High Court is willing to extend significant latitude to Parliament when determining the appropriate balance in respect of discretions affecting existing rights, especially (although not exclusively) in matters concerning civil rights or the public interest.

The effective excision of the existing rights principle removes a significant obstacle to the proliferation of certain third-wave reforms, such as case management and less adversarial trials, which are realised through the provision of broad substantive discretions.¹³¹ However, it is highly unlikely that judicial mediation would offend the existing rights principle in any event, especially if mediating judges do not subsequently adjudicate. In such circumstances it is hard to imagine how the mediation process might affect the pre-existing substantive legal rights of the parties. The pivotal question in respect of judicial mediation, therefore, is whether it may be exercised in accordance with the procedural implications derived from Ch III. This question is the focus of the following Chapter.

¹²⁹ Fairall and Lacey, above n 128, 1081.

¹³⁰ Kenneth Culp Davis, *Discretionary Justice: A Preliminary Enquiry* (1969).

¹³¹ Case management and the less adversarial trials are analysed in detail in Chapter 7.

CHAPTER 4

IMPLIED JUDICIAL PROCESS

In Chapter 3, it was concluded that a function which is not historically associated with the exercise of judicial power may nevertheless be vested in a Ch III court if it can be exercised in a judicial manner. It was also noted that, as judicial mediation is unlikely to affect substantive legal rights (because mediators have no determinative power), the pivotal question in this regard will be whether mediation can be carried out in accordance with ‘the essential character of a court [and] with the nature of judicial power’.¹ The essential characteristics derived by the High Court from Ch III extend to various public and individual (due process) rights, and may also extend to certain judicial powers necessary to maintain the integrity of the judicial process. Implied rights and integrity (which overlap in certain instances) are referred to here as components of a broader principle of implied ‘judicial process’ (the ‘judicial process’ implication).

This Chapter charts the development of the judicial process implication as it applies to federal courts. The first part of the Chapter examines the doctrinal basis of the judicial process implication, and identifies two disparate theoretical approaches based on the first and second limb of the separation doctrine respectively. The second part of the Chapter goes on to demonstrate that, while the full extent of the implied rights component of the implication remains uncertain, it is trite law that a degree of

¹ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan Deane and Dawson JJ).

procedural fairness (or ‘natural justice’)² and open justice is required in the exercise of judicial power.³ In contrast, it is shown that no procedures have yet been held invalid on the basis that they undermine the judicial integrity of a Ch III court.⁴ In the course of this analysis, further support is found for the proposition that the primary object of the judicial process implication is to ensure the inherent jurisdiction of the courts⁵ (the fourth of the essential jurisdictions identified in Chapter 2).⁶ The final part of this Chapter demonstrates that, while the judicial process implication notionally limits the functions that may be vested in the judiciary by Parliament (in combination with the overlapping rule that Parliament may not direct the exercise of judicial power)⁷ this fact alone will seldom hinder Parliament’s power to vest non-judicial functions in Ch III courts. By adopting the presumption that Parliament does not intend to exceed its legislative power,⁸ the High Court will ordinarily strike down

² The term ‘procedural fairness’ is adopted in preference to the term ‘natural justice’ so as to avoid confusion ‘between the relevant common law requirements of fairness and detachment and the jurisprudence of wider theological and civilian perceptions of natural law’. *Australia Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 366 (Deane J). See also *Plaintiff 157/2002 v Minister for Immigration* (2003) 211 CLR 476 [25] (Gleeson CJ).

³ Fiona Wheeler refers to this component of the implication as the ‘due process’ implication: Fiona Wheeler, ‘Due Process, Judicial Power and Chapter III in the High Court’ (2004) 32 *Federal Law Review* 205. See also Leslie Zines, *The High Court and the Constitution* (5th ed, 2008), 273-94; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, (3rd ed 2002) 1268; Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’ (1997) 23(2) *Monash University Law Review* 248.

⁴ State legislation has only been held invalid on the basis that it is incompatible with ‘institutional integrity’ on two occasions: *Kable v DPP* (NSW) (1996) 189 CLR 51; *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40. This highly uncertain area of law is discussed at length in Chapter 6.

⁵ Wendy Lacey, ‘Inherent Jurisdiction, Judicial Power, and Implied Guarantees under Chapter III of the Constitution’ (2003) 31 *Federal Law Review* 57.

⁶ See above Chapter 2 nn 190-194 and accompanying text.

⁷ *Liyanage v R* [1976] 1 AC 259, 290 (Lords MacDermott, Morris, Guest, Pearce and Pearson); *Australian Building Construction Employees’ and Builders Labourers’ Federation v Commonwealth* (1986) 161 CLR 88, 96 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ); *Leeth v Commonwealth* (1992) 174 CLR 455, 469-70 (Mason CJ, Dawson and McHugh JJ); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 36-37 (Brennan, Deane and Dawson JJ).

⁸ *Federal Commissioner of Taxation v Munro*; *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153, 180 (Isaacs J).

an Act/statutory provision only if a presumption in favour of validity cannot be applied.⁹

Judicial Process and the Rule of Law

The judicial process implication derives from the separation doctrine, the object of which (as pointed out in the Chapter 2) is to maintain judicial independence and impartiality because of the pivotal role played by the judiciary in Australia's federal system and, ultimately, to maintain the rule of law.¹⁰ The emphasis placed by the High Court on the purposive nature of the separation doctrine (as opposed to the abstract definition of judicial power) may affect the extent to which federal judges are permitted to mediate in accordance with Ch III.

Prior to the *Boilermakers' Case*, Dixon J (as he then was) and Evatt J had already laid one possible foundation for the implication of certain procedural requirements under the auspices of the incompatibility doctrine.¹¹ In *R v Federal Court of Bankruptcy; Ex parte Lowenstein* ('*Lowenstein*'), Their Honours held that a function which allowed the Bankruptcy Court to charge and prosecute bankrupts, contrary to the maxim *nemo*

⁹ See, for example: *A-G (Victoria) v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J). *Cominos v Cominos* (1972) 127 CLR 588, 599 (Gibbs J); *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617, 650, (Gibbs J); *Re Watson; Ex parte Armstrong* (1976) 136 CLR 248, 257 (Barwick CJ, Gibbs, Stephen and Mason JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 531-40 (Mason CJ), 650 (Dawson J), 692 (Toohey J), 721 (McHugh J). *Nicholas v The Queen* (1998) 193 CLR 173, 188 [20] (Brennan CJ), 202 [53] (Toohey J), 210-211 [78]-[80] (Gaudron J), 239 [168] (Gummow J) 276 [243]-[244] (Hayne J); *Truman v Truman* (2008) 216 FLR 365; *Crestin v Crestin* (2008) 39 Fam LR 420.

¹⁰ See above Chapter 2 nn 182-94, and accompanying text. See also *Polyukhovich*, where Gaudron J observed that it 'is not in doubt that Ch III is the source of important prohibitions which, amongst other things, operate to guarantee the independence of the federal judiciary'. *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 697.

¹¹ A majority of the High Court agreed that non-judicial functions may not be vested on a Ch III court if they are incompatible with the exercise of judicial power, but disagreed with Dixon and Evatt JJ that the function in question was incompatible. *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 566, 573 (Latham CJ), 573 (Rich J), 576-577, 591 (Starke J).

potest esse simul actor et judex ('no one can be litigant and judge at the same time'), did not:

fall within the conception of judicial power. The maxim quoted does not express a mere caution against human frailty. It epitomises part of the English notion of the judicial function. A long course of development produced a conception of the judicial process which placed the court in the position of a detached tribunal entertaining and determining civil and criminal pleas brought before it ... [The provision before the Court] terminated in an act which under the Constitution can be done only in the exercise of judicial power, namely, the conviction of an offender and the passing of judgment upon him; yet the duty is to be performed in a manner at variance with the conception of judicial power.¹²

This conclusion, according to their Honours', was based not on 'the wisdom, propriety or justice of the course laid down by the provision. It is entirely a question of the nature of the legislative power'.¹³ By referring to 'English notions' of the judicial function, Dixon and Evatt JJ emphasised the historical meaning of the term judicial power, and drew only indirectly on inherited constitutional 'assumptions' such as the rule of law.¹⁴ Dixon J would presumably have reached the same conclusion had he been addressing the issue vis-à-vis the separation doctrine, given that he was the senior judge in the *Boilermakers' Case*.¹⁵

¹² *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 588-89 (Dixon and Evatt JJ).

¹³ *Ibid* 589.

¹⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

¹⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 266-99 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See above Chapter 2 nn 149-82 and accompanying text.

In his dissenting judgment in the *Boilermakers' Case*,¹⁶ Williams J also considered that Parliament could not vest in Ch III courts 'functions which courts are not capable of performing consistently with the judicial process,'¹⁷ because this would be at variance with those courts' functions as repositories of Commonwealth judicial power. Unlike Dixon and Evatt JJ's approach however (which focussed on the meaning of the term 'judicial power', and could have applied with equal effect under the separation doctrine), Williams J identified this requirement in order to demonstrate that the strict separation of judicial called for by the majority was unnecessary to protect the judiciary's role as the guardian of the Constitution.¹⁸

Of course, the 'incompatibility' approach was outrun by the 'second limb' of the rule in the *Boilermakers' Case*¹⁹ (that Ch III courts may only exercise judicial power of functions incidental thereto).²⁰ In the early 1990's, however, the High Court (led by Deane and Gaudron JJ) found that an adherence to the 'judicial process' was also an implicit requirement of the separation doctrine.²¹ Christine Parker has observed that 'the precise basis' upon which their Honours constructed this implication is unclear, but identifies a number of possible rationales.²² Building on Christine Parker's analysis, Fiona Wheeler has identified two 'alternate theories for derivation of the due

¹⁶ Williams J intimated that he would have agreed with Dixon and Evatt JJ that the non-judicial functions in question in *Lowenstein* were incompatible with the Court's judicial functions. *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 313.

¹⁷ His Honour appeared to adopt his dissenting position for essentially pragmatic reasons, observing that 'until very recently ... the Arbitration Court has always been accepted as a body properly constituted to undertake its dual activities'. *Ibid* 315.

¹⁸ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 316.

¹⁹ Although it would later be revived as a means of limiting the functions that may be vested in federal judges in their private capacity (analysed in Chapter 6), and of limiting State and Territory legislative power in respect of State and Territory courts (analysed in Chapter 7).

²⁰ *Boilermakers' Case* (1956) 94 CLR 254, 271.

²¹ *Harris v Caladine* (1991) 172 CLR 84, 149, 150 (Gaudron J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607 (McHugh J), 703-04 (Gaudron J); *Leeth v Commonwealth* (1992) 174 CLR 455, 486-87 (Toohey and Deane JJ), 501-02 (Gaudron J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27-28 (Brennan, Deane and Dawson JJ).

²² Christine Parker, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 *Adelaide Law Review* 341, 354.

process principle'.²³ While these rationales/theories were identified in an individual rights context (reflecting a general trend in constitutional scholarship at the time),²⁴ the same reasoning naturally applies to the integrity component of the judicial process implication.

The first approach, adopted initially by Deane J, is founded on the 'general policy' of the separation doctrine;²⁵ that is to say, to ensure judicial independence and impartiality because of the critical role played by the judiciary in the 'maintenance and enforcement of the boundaries of federalism'.²⁶ Deane J's approach draws on the first limb of the rule in the *Boilermakers' Case* by emphasising the purpose behind the Constitution's exclusive vesting of judicial power in courts. In *Polyukhovich v The Commonwealth of Australia* ('*Polyukhovich*'), His Honour stated that:

The main object of the sometimes inconvenient separation of judicial from executive and legislative functions separation ... will, of course, be achieved only by the Constitution's requirement that judicial power be vested exclusively in the courts which it designates if the judicial power so vested is exercised by those courts in accordance with the essential attributes of the curial process. Indeed, to construe Ch. III of the Constitution as being concerned only with labels and as requiring no more than that the repository of judicial power be called a court would be to convert it into a mockery, rather than a reflection, of the doctrine of separation of powers ... [I]n insisting that the judicial power of the Commonwealth be vested only in the courts designated by Ch. III, the Constitution's intent and meaning were that

²³ Wheeler, 'Due Process, Judicial Power and Chapter III in the High Court', above n 3, 209.

²⁴ Lacey, above n 5, 57-58.

²⁵ Parker, above n 22, 354.

²⁶ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 276.

judicial power would be exercised by those courts with all that that notion essentially requires'.²⁷

Thus, in Deane J's view, the first limb of the separation doctrine has two purposes: to ensure that exclusively judicial functions are exercised in a judicial manner, and to protect those functions from legislative interference.²⁸ Put differently, the reason for the exclusive vesting of functions in the judiciary is not only to prevent their usurpation by Parliament, but because the rule of law requires that judges act judicially to protect individual rights and to safeguard the legitimacy of judicial decision-making.²⁹ His Honour reaffirmed this view in *Leeth v Commonwealth* (this time joined by Toohey J):

Those provisions [of Ch III] not only identify the possible repositories of Commonwealth judicial power. They also dictate and control the manner of its exercise. They are not concerned with mere labels or superficialities. They are concerned with matters of substance. Thus, in Ch III's exclusive vesting of the judicial power of the Commonwealth in the 'courts' which it designates, there is implicit a requirement that those 'courts' exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially.³⁰

²⁷ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607.

²⁸ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 355 (Griffith CJ); *New South Wales v Commonwealth* (1915) 20 CLR 54, 62 (Griffith CJ), 89-90 (Isaacs J), 106-07 (Powers J); 109-10 (Rich J); *Waterside Workers' Federation of Australia v JW Alexander* (1918) 25 CLR 434, 461 (Barton J), 469-70 (Isaacs and Rich JJ), 488 (Powers J).

²⁹ Deane J's approach reflects the view expressed by Jacobs J, that the Constitution 'has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive'. *R v Quinn; Ex parte Consolidated Foods* 138 CLR 1, 11.

³⁰ *Leeth v Commonwealth* (1992) 174 CLR 455, 486-87.

Shortly thereafter, in *Chu Kheng Lim v Minister for Immigration*, Deane J again noted (this time joined by Brennan and Dawson JJ) that ‘the Constitution's concern is with substance and not mere form,’³¹ and that (as such) judicial power must be exercised consistently with ‘the essential character of a court [and] with the nature of judicial power’.³² Their Honours also explicitly emphasised the connection (albeit in a criminal context) between the exercise of judicial power and the rule of law.³³

It is crucial to appreciate that, although Deane J’s approach draws on the first limb of the separation doctrine (isolating judicial power from legislative usurpation), it actually serves, and reinforces the object of, the second limb (by ensuring the integrity of the judicial function).³⁴ Whereas the majority in the *Boilermakers’ Case* relied on the form and drafting of the Constitution to achieve this end,³⁵ however, Deane J’s approach focuses directly on the rule of law values served by Ch III. In contrast, the approach favoured by Gaudron J is founded directly in the second limb of the separation doctrine, and expands ‘the traditional doctrine of the separation of judicial power by including an entirely new element in it that guarantees judicial process to individuals’.³⁶ In *Harris v Caladine*, Gaudron J stated that:

It is upon and with respect to “judicial power” as a concept or abstraction that s. 71 has its primary and substantive operation...Judicial power is usually defined in terms of its subject matter, but it is a power that, for complete

³¹ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27.

³² *Ibid.*

³³ *Ibid* 27-28. With reference to Blackstone and Coke, their Honours explained that every ‘citizen is “ruled by the law, and by the law alone” and “may with us be punished for a breach of law, but he can be punished for nothing else.”’

³⁴ See above Chapter 2 nn 190-194.

³⁵ See above Chapter 2 nn 195-205.

³⁶ Parker, above n 22, 354 – 355. See also Wheeler, ‘Due Process, Judicial Power and Chapter III in the High Court’, above n 3, 210.

definition, requires description of its dominant and essential characteristic, namely, that it is exercised in accordance with that process which is referred to as “the judicial process.”³⁷

In *Polyukhovich*, Gaudron J again stated that ‘an essential feature of judicial power is that it be exercised in accordance with the judicial process,’³⁸ and in *Leeth v Commonwealth* (*‘Leeth’*), Her Honour considered that:

It has often been said that judicial power has not proved susceptible of exhaustive or exclusive definition ... [One] feature which renders ‘judicial power’ difficult to define is that it cannot be defined only in terms of its content. It is necessary to have regard to the manner in and the processes by which the power is or is to be exercised. It is an essential feature of judicial power that it should be exercised in accordance with the judicial process.³⁹

Despite the fine distinction separating the reasoning adopted by Deane J and Gaudron J, Fiona Wheeler has identified two reasons for preferring Deane J’s approach. Firstly, the second limb of the separation doctrine has been criticised for requiring ‘excessive subtlety and technicality in the operation of the Constitution’.⁴⁰ Attempts to provide a definition of judicial power ‘that is at once exclusive and exhaustive’⁴¹ have failed due to the elusive and fluid nature of the concept.⁴² Deane J’s approach avoids the

³⁷ *Harris v Caladine* (1991) 172 CLR 84, 149, 150.

³⁸ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703-04.

³⁹ *Leeth v Commonwealth* (1992) 174 CLR 455, 501-02.

⁴⁰ *R v Joske; ex parte Building Construction Employees and Builders’ Labourers’ Federation* (1974) 130 CLR 87, 90 (Barwick CJ). See above Chapter 2 195-205 and accompanying text.

⁴¹ *R v Davison* (1954) 90 CLR 353, 366 (Dixon CJ, McTeirnan J).

⁴² *Leeth v Commonwealth* (1992) 174 CLR 455, 501 – 502 (Gaudron J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 497 (Gaudron J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 532 (Mason J).

need to ‘place further emphasis on the abstract nature of judicial power,’⁴³ focusing instead upon the object of the separation doctrine and the rule of law values served by it. The second reason that Fiona Wheeler prefers Deane J’s approach is that ‘the second limb of the separation doctrine has not historically been as stable as the first. In the 1970s and 1980s it appeared that the High Court might overturn the second limb and replace it with an incompatibility test’.⁴⁴ Even if the second limb of the separation doctrine had given way to an incompatibility test, of course, a similar implication is likely to have crystallised as an aspect of incompatibility.⁴⁵ After all, Gaudron J’s approach is, in essence, a restatement of the approach propounded by Dixon and Evatt JJ in *Lowenstein*. Elements of due process have also been recognised as measures of incompatibility vis-à-vis the *persona designata* exception and the *Kable* doctrine (discussed in Chapters 5 and 6).

In summary, at least two distinct rationales can be identified for the development of the judicial process implication: it may flow from the form and content of the Constitution and the abstract meaning of the term ‘judicial power’ (as per Gaudron J), or, alternatively, it may reflect the rule of law values which the separation doctrine seeks to realise (as per Deane and Toohey JJ). It remains unclear which of these rationales is correct, and (for the most part) the answer to this question is unlikely to significantly affect the practical consequences of the judicial process implication.⁴⁶ However, the importance of the distinction between these approaches will become

⁴³ Wheeler, ‘Due Process, Judicial Power and Chapter III in the High Court’, above n 3, 210.

⁴⁴ Ibid 211; citing *R v Joske; Ex parte Australian Building Construction Employees and Builders’ Labourers’ Federation* (1974) 130 CLR 87, 90 (Barwick CJ), 102 (Mason J); *Hilton v Wells* (1985) 157 CLR 57. See above Chapter 2 nn 112-21 and accompanying text.

⁴⁵ Wheeler, ‘Due Process, Judicial Power and Chapter III in the High Court’, above n 3, 211. See also George Winterton, ‘The Separation of Power as an Implied Bill of Rights’, in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 185, 202 (n 117).

⁴⁶ Wheeler, ‘Due Process, Judicial Power and Chapter III in the High Court’, above n 3, 210.

increasingly apparent if (as seems likely) changing social and economic requirements continue to stimulate the introduction of new and varied judicial functions and procedures (such as judicial mediation). In Chapter 2, it was explained that historical considerations have had the greatest influence on the High Court's interpretation of judicial power. While 'the values involved in the separation of powers'⁴⁷ have also influenced the High Court in this regard, Deane J's approach increases the emphasis placed upon the purposive nature of the separation doctrine and provides a more malleable (and meaningful) benchmark against which to measure the boundaries of acceptable judicial practice.

One final point should be made. The conclusion drawn in Chapter 2 – that the implications derived from the separation doctrine will apply to rules of court – is supported regardless of which approach (Deane or Gaudron JJ's) is adopted. It is implicit in both approaches that the judicial process implication will limit the procedures that can be developed by the judiciary. This proposition is borne out by the High Court's judgments in *Bass v Permanent Trustee Co Ltd*⁴⁸ and *Ebner v Official Trustee in Bankruptcy*⁴⁹ ('*Ebner v Official Trustee*') (which apply and extend the judicial process implication in a non-statutory context). As will be seen, however, this distinction is unlikely to make a significant difference in any event, as (in all probability) the validity of judicial mediation will turn upon how judges exercise the discretionary power to mediate in practice; irrespective of its source.

⁴⁷ Zines, above n 3, 221.

⁴⁸ (1999) 198 CLR 334.

⁴⁹ (2000) 205 CLR 337.

Which ‘Rights’ are implied by Ch III?

The following part of this Chapter explores the boundaries of the due process component of the judicial process implication, in order to determine which aspects of that concept will control the capacity of Ch III courts to engage in judicial mediation. This analysis demonstrates that substantive due process rights are unlikely to be protected by the judicial process implication, but that common law rules of procedural fairness have now been substantially absorbed by it. It is concluded that whether judges can mediate in Ch III courts will depend upon whether judicial mediation can be carried out without bias, in a manner that ensures the provision of a fair trial, and consistently with the requirements of open justice.

Since its inception in *Polyukhovich* and *Leeth* the judicial process implication has been affirmed on a number of occasions.⁵⁰ In *Nicholas v The Queen* (*‘Nicholas’*) it gained majority support,⁵¹ and Gaudron J once again restated her belief that:

Judicial power is not adequately defined solely in terms of the nature and subject matter of determinations made in exercise of that power. It must also be defined in terms that recognise it is a power exercised by courts and exercised by them in accordance with the judicial process.⁵²

Her Honour went on to identify what she believed to be the essential characteristics of a court (or the ‘judicial process’):

⁵⁰ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Cameron v The Queen* (2002) 209 CLR 339, 352 [44] (McHugh J).

⁵¹ (1998) 193 CLR 173, 185 (Brennan CJ), 202 (Toohey J), 207-209 (Gaudron), 232 (Gummow JJ).

⁵² (1998) 193 CLR 173, 208 [73].

In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorized to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.⁵³

This formulation provides a useful point of reference from which to chart the development of implied rights (due process and public) on the one hand, and the requirements of judicial integrity (encompassed in the final three of Gaudron J's requirements) on the other.

In US constitutional theory it is well established that due process consists of substantive and procedural aspects.⁵⁴ In a substantive sense it relates to the validity of

⁵³ *Nicholas v The Queen* (1998) 193 CLR 173, 208 [73].

⁵⁴ The 'substantive due process' doctrine is rooted in the fourteenth amendment to the US Constitution, s 1 of which states that no State shall 'deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'. The Supreme Court has interpreted this provision expansively by incorporating within it the substantive rights provided by the Bill of Rights, and certain 'fundamental rights' essential to the maintenance of 'liberty'. Landmark decisions include: *Lochner v New York*, 198 US 45 (1905) (workers rights); *Gitlow v New York*, 268 US 652 (1925) (right to free speech); *Brown v Board of Education*, 47 US 583 (1954) (right to racial equality); *Gideon v Wainwright*, 372 US 335 (1963) (right to legal representation); *Miranda v Arizona*, 384 US 436 (1966) (right to be advised of constitutional rights on arrest); *Roe v Wade*, 410 US 113 (1973) (right to procure an abortion); *Lawrence v Texas*, 539 US 123 (2003) (right

laws which conflict with constitutionally protected rights and liberties, and in a procedural sense it refers to the requirement that decision-makers adopt procedures appropriate to the forum in question. For a while (and as Gaudron J suggested in *Nicholas*) it looked as though the due process implication might also guarantee certain substantive due process rights – despite the fact the Australia has no due process clause similar to the Fourteenth Amendment to the US Constitution, or a bill of rights equivalent to the US Charter.⁵⁵

In *Leeth*, Deane and Toohey JJ reasoned that the ‘conceptual basis of the Constitution’⁵⁶ and the implications of the separation of judicial power, require that the due process implication be interpreted so as to include a duty to ‘extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds’.⁵⁷ Gaudron J also concluded that the Constitution guarantees an element of equality before the law, but (consistent with her definitional approach) founded her conclusion on the ‘much narrower’ grounds that this guarantee is implicit within the meaning of judicial power.⁵⁸ In other words, Gaudron J proposed that a substantive

to sexual privacy). See generally: Edward Keynes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process* (1996); Michael J Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (2001); Peter J Rubin, ‘Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights’ (2003) 103(4) *Columbia Law Review* 833.

⁵⁵ Gaudron J also suggested in *Polyukhovich* that the due process implication may prevent the application of certain retroactive laws: ‘The usurpation of judicial power by a law which declares a person guilty of an offence produces the consequence that the application of that law by a court would involve it in an exercise repugnant to the judicial process. It is repugnant to the judicial process because the determination of guilt or innocence is foreclosed by the law’. *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 706.

⁵⁶ *Leeth v Commonwealth* (1992) 174 CLR 455, 486.

⁵⁷ *Ibid* 487.

⁵⁸ *Ibid* 501-02.

law would be invalid if it directed a Ch III court to treat people unequally, because such a law could not be exercised in accordance ‘with the judicial process’.⁵⁹

Neither of these views found support with other members of the Court, and the proposition that Ch III implies substantive due process rights is now doubtful.⁶⁰ Mason CJ, Dawson and McHugh JJ found no basis for the proposition that substantive equality is constitutionally guaranteed.⁶¹ Nor, according to their Honours’, is the exercise of substantively discriminatory laws inconsistent with the judicial process. The due process implication is premised upon the need to maintain ‘the essential attributes of the curial process’, and this process is principally governed by ‘the rules of natural justice [which] are essentially functional or procedural’ in nature.⁶² Thus, the due process implication operates to limit the ‘the function of a court rather than the law which a court is to apply’.⁶³ This position was supported by a majority in *Kruger v Commonwealth*, Dawson J, for example, stating that:

A Ch III court cannot be made to perform a function which is of a non-judicial nature or is required to be performed in a non-judicial manner. Chapter III may, perhaps, be regarded in this way as affording a measure of due process, but it is due process of a procedural rather than substantive nature.⁶⁴

⁵⁹ *Leeth v Commonwealth* (1992) 174 CLR 455, 501-02.

⁶⁰ An alternative view, discussed in more detail below, is that Ch III indirectly protects procedural rights by entrenching the inherent/implied power of courts to ensure fairness in legal proceedings. As Wendy Lacey points out, it is widely recognised that ‘the powers falling within the scope of a court’s inherent jurisdiction are ancillary or incidental to a court’s general jurisdiction and are, therefore, procedural in nature’. Lacey, above n 4, 64-65; citing Peter Twist, ‘The Inherent Jurisdiction of Masters’ (1996) *New Zealand Law Journal* 351; and Sir Jack Jacob ‘The Inherent Jurisdiction of the Court’ (1970) 23 *Current Legal Problems* 23, 24-5.

⁶¹ *Leeth v Commonwealth* (1992) 174 CLR 455, 469.

⁶² *Ibid* 470 (Mason CJ, Dawson and McHugh JJ).

⁶³ *Ibid* 469.

⁶⁴ (1997) 190 CLR 1 [35] (Dawson J).

The rejection of Gaudron J's view is logical if it is accepted that the statutory provision in question in *Leeth*, which required Ch III courts to sentence federal offenders in accordance with divergent State or territory legislation, is properly characterised as substantive in nature. However, it is well recognised that the dividing line between substantive and procedural laws 'is not always easy to draw,'⁶⁵ and there is merit to the proposition (expressed by Gaudron J in *Kruger*) that a substantive law which requires a Ch III court to exercise a power 'in a discriminatory manner' may be invalid in both a procedural and a substantive sense.⁶⁶ *Wong v The Queen*⁶⁷ and *Cameron v The Queen*⁶⁸ would appear to confirm this position.⁶⁹

Whether or not implied due process does in fact encompass certain substantive rights, it is of course the procedural aspects of due process which are of particular relevance to the validity of judicial mediation (because judicial mediation is non-determinative, and therefore unlikely to directly affect substantive rights).⁷⁰ Even in this narrower context, however, the scope of constitutionally implied due process remains uncertain.⁷¹

⁶⁵ Justice Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as Well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235, 236.

⁶⁶ *Kruger v Commonwealth* (1997) 190 CLR 1, 112. See also, *APLA Ltd v Legal Services Commissioner* (2006) 224 CLR 322, [217]; Wheeler, 'Due Process, Judicial Power and Chapter III in the High Court', above n 3, 224.

⁶⁷ *Wong v The Queen* (2001) 207 CLR 584, 608 (Gaudron, Gummow and Hayne JJ);

⁶⁸ *Cameron v The Queen* (2002) 209 CLR 339, 352 [44] (McHugh J): 'If there is one principle which lies at the heart of the judicial power of the Commonwealth, it is that courts, exercising federal jurisdiction, cannot act in a way that is relevantly discriminatory'.

⁶⁹ Wheeler, 'Due Process, Judicial Power and Chapter III in the High Court', above n 3, 282; Zines, above n 3, 282.

⁷⁰ See above Chapter 1 nn 13-17 and accompanying text.

⁷¹ Zines, above n 3, 274. See also Wheeler, 'Due Process, Judicial Power and Chapter III in the High Court', above n 3, 220. There are, of course, numerous pronouncements to the effect that judges must act 'judicially'. See, for example, *Re Watson; Ex Part Armstrong* (1976) 136 CLR 248, 257-58 (Barwick CJ, Gibbs, Stephen and Mason JJ), 'a judge of the Family Court exercises judicial power and must discharge his duty judicially'. In *Ebner*; Kirby J observed that 'it is difficult to read the provisions of Ch III, viewed in context and having regard to their purposes, without deriving a requirement that

In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*, a majority of the High Court stated that if a function is performed judicially, it is performed ‘without bias and by a procedure that gives each interested person an opportunity to be heard and to deal with any case presented by those with opposing interests’.⁷² Although the majority judgment in *Wilson* arose in the context of the incompatibility doctrine, ‘it is but a short step [from this pronouncement] to the due process requirement’.⁷³ As noted above, Gaudron J took this short step in *Nicholas*, explaining that in her view the procedural implications of the due process implication include, inter alia, independence and impartiality, and the right of a party to be heard in respect of claims made against him/her in accordance with a procedure conducive to that purpose. Both of these pronouncements reflect the common law requirements of procedural fairness, which comprises two broad heads: the ‘fair hearing rule’ (which embodies the principle *audi alterum partem*, or ‘hear the other side’), and the ‘rule against bias’ (which reflects the principle *nemo iudex in parte sua*, or ‘no person may judge their own case’).⁷⁴ These two heads are examined in more detail below, but it may be stated, in general terms, that Ch III courts must adhere to the principles of procedural fairness.⁷⁵

the courts for which Ch III provides must be “courts” and act in accordance with the “judicial process.”

⁷² *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

⁷³ Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’, above n 3, 259.

⁷⁴ *Kioa v West* (1985) 159 CLR 550, 569-570 (Gibbs CJ) 582 (Mason J) 602 (Wilson J) 628 (Brennan J) 633 (Deane J).

⁷⁵ See, for example: *Harris v Caladine* (1991) 172 CLR 84, 150 (Gaudron J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 26-27 (Brennan, Deane and Dawson JJ); *Grollo v Palmer* (1995) 184 CLR 348, 394-95 (Gummow J); *Nicholas v The Queen* (1998) 193 CLR 173, 188 (Brennan CJ), 208 (Gaudron J). See also Fiona Wheeler, Wheeler, ‘Due Process, Judicial Power and Chapter III in the High Court’, above n 3; Parker, above n 22; Wendy Lacey, above n 5, 57; Leslie Zines, ‘Legalism, Realism and Judicial Rhetoric in Constitutional Law’ (2002) 5 *Constitutional Law and Policy Review* 21; Patrick Keyzer, ‘Pfeiffer, Lange, the common law of the Constitution and the Constitutional right to natural justice’ (2000) 20 *Australian Bar Review* 87; Sir Anthony Mason,

It is, however, one thing to state that judges must conduct proceedings in accordance with the principles of procedural fairness, and quite another to determine the scope and content of that concept in a prescriptive manner. For one thing, the extent to which these principles apply will vary from case to case.⁷⁶ As Graeme Johnson has explained, ‘the contents of natural justice range from a full-blown trial into nothingness’.⁷⁷ Procedural fairness cannot be defined in absolute terms because, ‘the degree of procedural fairness implied will ... be consistent with the significance of the right or interest at stake’.⁷⁸ Thus, Gibbs CJ explained in *National Companies and Securities Commission v News Corporation*, that:

The authorities show that natural justice does not require the inflexible application of a fixed body of rules; it requires fairness in all the circumstances, which include the nature of the jurisdiction or power exercised and the statutory provisions governing its exercise.⁷⁹

Similarly, according to Mason J:

The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?⁸⁰

‘Trends in Constitutional Interpretation’ (1995) 18 *University of New South Wales Law Journal* 237, 245.

⁷⁶ Margaret Allars, ‘Procedural fairness: disqualification required by the bias rule’. (1999) 4 (3) *Judicial Review* 269, 271: ‘Since the content of procedural fairness is flexible, depending upon the circumstances of the case, no general rules can be stated as to the kind of hearing which is required’.

⁷⁷ Graeme Johnson ‘Natural Justice and Legitimate Expectation in Australia’ (1985) 15 *Federal Law Review* 39, 71. Brennan J accepted this proposition in *Kioa v West*, (1985) 159 CLR 550, 615-16.

⁷⁸ Patrick Keyzer, ‘Constitutional Law’, (2nd ed, 2005) 275.

⁷⁹ *National Companies and Securities Commission v News Corporation* (1984) 156 CLR 296, 314.

⁸⁰ *Kioa v West* (1985) 159 CLR 550, 585.

In addition, the due process implication does not extend to all aspects of procedural fairness. The High Court has approached the constitutional limits of the rule against bias and the fair hearing rule discretely; a cautionary approach which recognises the elusive nature of procedural fairness, and the inherent ‘danger in entrenching [the rules of natural justice] by means of implication from Chapter III so that no evolution is possible as new situations or even new social perceptions arise’.⁸¹ The following two sections explore the constitutional entrenchment of these rules in detail, in order to determine which procedural rules judicial mediation must comply with if it is to be carried out by Ch III courts.

The Rule against Bias

Deane J has observed that the apprehension of bias principle covers ‘at least ... four distinct, though sometimes overlapping, main categories of case’: interest, conduct, association, and extraneous information.⁸² A distinction was traditionally drawn between pecuniary interests, on the one hand, and other interests or categories of bias. Thus, a judge who had a pecuniary interest in a matter would be automatically disqualified from hearing that matter (irrespective of the circumstances);⁸³ whereas the test in all other instances would be whether bias had been ‘reasonably apprehended’.⁸⁴ The distinction between pecuniary and non-pecuniary interests has

⁸¹ Zines, above n 3, 279.

⁸² *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).

⁸³ *Dimes v Proprietors of the Grand Junction Canal* (1852) 10 ER 301; *Webb v The Queen* (1994) 181 CLR 41, 74-75 (Deane J).

⁸⁴ *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewart); *Re Watson; Ex parte Armstrong* (1976) 136 CLR 248, 264 (Barwick CJ, Gibbs, Stephen and Mason JJ); *Webb v The Queen* (1994) 181 CLR 41, 47 (Mason CJ and McHugh J).

now been abandoned in Australia; as explained in more detail below.⁸⁵ For a time, there was also a question whether the reasonable apprehension test might have been replaced by a test of ‘real likelihood’ or ‘real danger,’⁸⁶ following a series of cases in England to that effect.⁸⁷ However, any such suggestion was unanimously rejected by the High Court in *Webb v The Queen*.⁸⁸ Thus, in Australia:

The reasonable apprehension test is a test of possibility rather than probability. The question [in all instances] is whether the fair minded observer may or ‘might’, rather than ‘would’ entertain a reasonable apprehension. It is a test which is not always easy to apply for it may involve questions of degree and particular circumstances may strike different minds in different ways.⁸⁹

The specific requirements of the rule against bias, and the circumstances in which judicial mediation might result in apprehended bias, are considered at length in Chapter 8.⁹⁰ The remainder of this section focuses on the relationship between the rule against bias and Ch III.

⁸⁵ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 356-57 [54-55] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 366-67 [92]-[98] (Gaudron J), 381-90 [141]-[163] (Kirby J dissenting).

⁸⁶ *R v Sawyer* (1980) 71 Cr. App. R. 283, 285-286; *R v Spencer* [1987] AC 128, 144; *R v Gough* [1993] A.C. 646, 668, 670 (Lord Goff); *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* (No 2) [1999] 1 All ER 577.

⁸⁷ *Webb v The Queen* (1994) 181 CLR 41, 51-53 (Mason CJ and McHugh J) 57 (Brennan J), 67-74 (Deane J), 87-88 (Toohey J).

⁸⁸ *Ibid.*

⁸⁹ Margaret Allars, above n 76, 276-77.

⁹⁰ See below Chapter 8 nn 66-174 and accompanying text.

The bulk of the High Court's constitutional analysis of the rule against bias has arisen in the context of the *persona designata* exception.⁹¹ The procedural implications derived from Ch III in this area must also apply to federal courts, however, or judges would be subject to tighter constitutional controls in their private capacity than they would be in their judicial capacity.

Subsequent authority supports the logic of this conclusion. In *Ebner v Official Trustee in Bankruptcy* ('*Ebner v Official Trustee*'), two members of the High Court (Gaudron and Kirby JJ) found the rule against bias to be an implicit requirement in the context of Ch III courts.⁹² *Ebner v Official Trustee* involved two appeals. The first appeal (*Ebner*) arose out of proceedings in the Federal Court, in which the presiding judge was a 'contingent beneficiary' of a family trust, which in turn had an interest in the outcome of proceedings. The second appeal (*Clenae*) arose out of proceedings in the Victorian Supreme Court, during the course of which the presiding judge inherited shares in the plaintiff bank. In short, both appeals were founded in apprehended bias on the basis that the judge had a pecuniary interest in the proceedings.

Gleeson CJ, McHugh, Gummow and Hayne JJ determined matters on the basis of common law principles alone, observing that the rule against bias reflects the fundamental common law requirement that trials must be conducted by an independent and impartial tribunal.⁹³ Their Honours noted that a judge may be

⁹¹ The *Persona designata* exception is considered in Chapter 6. The principal cases are: *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348; and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

⁹² *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 362 [79] (Gaudron J); 382-383 [145]-[146] (Kirby J).

⁹³ *Ibid* 382-344 [3] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also: *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 79 [73] (Gummow Hayne and Crennan JJ), 122 [195].

disqualified (and any judgment/order delivered declared invalid) as a result of ‘actual bias’ or a reasonable ‘apprehension of bias’, but did not accept that:

there is a separate and free-standing rule of automatic disqualification which applies where a judge has a direct pecuniary interest, however small, in the outcome of the case over which the judge is presiding. The principle of general application earlier considered would have been sufficient (had it then existed) to cover the case of Dimes. For the reasons already explained, a rule of automatic disqualification would be anomalous. It is in some respects too wide, and in other respects too narrow. There is ‘no reason in principle why it should be limited to interests that are pecuniary, or why, if it were so limited, it should be limited to pecuniary interests that are direct’.⁹⁴

That a mere apprehension of bias is sufficient to breach the requirements of procedural fairness their Honours explained, ‘gives effect to the requirement that justice should be done and be seen to be done’.⁹⁵ Thus, the appropriate test in all instances is whether ‘a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide’.⁹⁶ The majority found no such apprehension to have arisen in either of the cases on appeal.⁹⁷

⁹⁴ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 356-57 [54]-[55] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁹⁵ *Ibid* 382-44 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁹⁶ *Ibid*. See also *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 258-63 (Barwick CJ, Gibbs, Stephen and Mason JJ); *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 293-94; *Webb v The Queen* (1994) 181 CLR 41, 67 (Deane J); *Johnson v Johnson* (2000) 201 CLR 488, 492 [11] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁹⁷ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 358 [58] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

Gaudron and Kirby JJ went further, drawing an explicit connection between the common law apprehension of bias test and the impartiality requirements implied by Ch III. Kirby J expressed the view that ‘the ultimate foundation for the judicial requirements of independence and impartiality rests on the requirements of, and implications derived from, Ch III of the Constitution’.⁹⁸ Gaudron J was also of the opinion that;

the underlying principle which, on occasions, requires that a judge disqualify himself or herself is that courts must act impartially and must also be seen to act impartially. These are requirements embedded in the common law and in all developed legal systems. In my view, they are also required by Ch III of the Constitution.⁹⁹

In light of *Ebner v Official Trustee*, (and despite the fact that Kirby J and Gaudron JJ’s views were, strictly speaking, *obiter*) it is now clear that the common law apprehension of bias rules form an essential part of the judicial process implication. According to Leslie Zines, ‘the rules regarding bias seem to be at the heart of the judicial process and of the purpose of the separation of powers’.¹⁰⁰ Likewise, Fiona Wheeler has stated that ‘Gaudron J’s view that the rules governing judicial disqualification for bias in Australia are constitutional requirements is surely correct in federal jurisdiction’.¹⁰¹ These views have since been confirmed by McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ in *North Australian Aboriginal*

⁹⁸ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 382-83 [145]-[146] (Kirby J).

⁹⁹ *Ibid* 362 [79].

¹⁰⁰ Leslie Zines, above n 3, 278.

¹⁰¹ Wheeler, ‘Due Process, Judicial Power and Chapter III in the High Court’, above n 3, 216. See also: Enid Campbell, ‘Waiver of Judicial Disqualification for Bias or Apprehended Bias – A Constitutional Issue’ (1999) 2 *Constitutional Law and Policy Review* 41, 41.

Legal Aid Service v Bradley.¹⁰² *Ebner v Official Trustee* is also significant in that it applies the impartiality limb of the due process implication in a non-statutory context, demonstrating (as noted previously) that court procedures and practice directions are also susceptible to invalidity if they cause a court to act in a manner which undermines the rule against bias.

It summary, whether Ch III courts can engage in judicial mediation in accordance with the judicial process implication will depend, in part, upon whether, as a consequence of judicial mediation, ‘a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide’.¹⁰³ This deceptively simple proposition conceals a raft of highly complex issues regarding the nature of the judicial function and the reality of judicial practice. These issues are the focus of Chapters 7 and 8.

The Fair Hearing Rule

Certain aspects of the traditional judicial process which seek to ensure fairness in the trial process have also been identified as implicit requirements of Ch III. At common law, the fair hearing rule requires that a party should be allowed to make submissions (written or oral), to cross-examine witnesses,¹⁰⁴ and, in certain circumstances (although principally as a defendant in criminal matters), should be entitled to the disclosure of information by the opposing party. By and large, the High Court’s consideration of the fair hearing rule as an implication of Ch III has taken place in a criminal context; reflecting Deane J’s proposition that ‘the guarantee involved in the

¹⁰² (2004) 218 CLR 146, 163 [29].

¹⁰³ Ibid.

¹⁰⁴ This right is reflected in pt 2.1 div 2, s 27 of the *Evidence Act 1995* (Cth).

vesting of judicial power exclusively in Ch.III courts is at its most important in relation to criminal matters.¹⁰⁵ Until recently, however, this aspect of the due process component had only been identified in the dissenting judgments of Gaudron and Deane JJ. In *Re Nolan; Ex parte Young*, for example, Gaudron J explained that:

Because it is an essential feature of judicial power that it be exercised in accordance with the judicial process, Ch III provides a guarantee, albeit only by implication, of a fair trial of those offences created by a law of the Commonwealth which must be tried in the courts named or indicated in s71 [of the Constitution].¹⁰⁶

In *Dietrich v The Queen*, Deane J adopted similar reasoning:

The fundamental prescript of the criminal law of this country is that no person shall be convicted of a crime except after a fair trial according to law. In so far as the separation of power is concerned, that principle is entrenched by the Constitution's requirement of the observance of judicial process and fairness that is implicit in the vesting of the judicial power of the Commonwealth exclusively in the courts which Ch.III of the Constitution designates.¹⁰⁷

While the right to a fair trial may be 'at its most important' in criminal matters, the same implication naturally applies in civil matters, and it was in this context that the

¹⁰⁵ *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 581 (Deane J).

¹⁰⁶ (1991) 172 CLR 460, 496.

¹⁰⁷ *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J). Gaudron J also reiterated her earlier opinion, at 362, that it 'is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law ... The fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by Ch. III's implicit requirement that judicial power be exercised in accordance with the judicial process'.

High Court finally recognised the fair hearing limb of the judicial process implication.¹⁰⁸ *Bass v Permanent Trustee Co Ltd* ('Bass') involved three appeals concerning an alleged failure by the Federal Court to provide a fair hearing in respect of certain matters determined under the *Trade Practices Act* 1974 and the *Financial Services Act* 1987 (NSW).¹⁰⁹ Despite observing that no facts had been agreed between the parties or determined by the Court in relation to a key issue, the Full Court of the Federal Court issued a declaration on the basis of its own 'view' of the facts, supported only by 'general background information' in the amended statement of claim.¹¹⁰ In a unanimous judgment, a Full Court of the High Court held that the Federal Court had failed to accord procedural fairness, and drew a direct connection between the fair hearing rule and Ch III:

Judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. And that requires that the parties be given an opportunity to present their evidence and to challenge the evidence led against them. It is contrary to the judicial process and no part of judicial power to effect a determination of rights by applying the law to facts which are neither agreed nor determined by reference to the evidence in the case.¹¹¹

Bass secures the first two limbs of the common law fair hearing rule (that a party should be allowed to make submissions and to cross-examine witnesses) at the heart

¹⁰⁸ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334.

¹⁰⁹ *Woodlands, Bass & Conca v Permanent Trustee Company Ltd (HomeFund case)* (1996) 68 FCR 213.

¹¹⁰ *Ibid* 217.

¹¹¹ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

of the due process implication.¹¹² Even in this narrow context, however, the existence of a constitutional right to a fair hearing does not afford an absolute constitutional protection. As noted above, the requirements of procedural fairness are not fixed, and will vary according to the rights at stake and the nature of jurisdiction in question. This point has been made repeatedly in the application of the fair hearing rule at common law. The admission of certain evidence, for example, (such as confessional evidence, hearsay and evidence illegally obtained) has generally been seen as a matter of judicial discretion having regard to what is fair in the circumstances.¹¹³ It goes without saying that the recognition of a constitutionally implied right to a fair hearing does not replace this discretion with an obligation to exclude evidence in certain circumstances. On the contrary, the constitutionally entrenched right to a fair trial prohibits legislation which purports to remove such discretionary powers.

This point was made clear in *Nicholas*. In that instance, the High Court determined that the fair hearing rule did not operate to exclude the admission of certain evidence obtained illegally by law enforcement.¹¹⁴ The appellant had been indicted on drug importation charges, and argued that an amended provision of the *Crimes Act 1914* undermined his right to a fair hearing by directing that the court admit evidence

¹¹² This proposition has been recognised on a number of occasions. See, for example, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, [103] (Gummow, Hayne, Heydon and Kiefel JJ). See also *Ray Fitzpatrick Pty Ltd v Minister for Planning (No 4)* [2008] NSWLEC 161 (Unreported, Sheahan J and Sheehan AJ, 29 April 2008), [47], where it was stated that the ‘High Court, in a series of important cases, has clearly established the principle that when a trial court embarks on consideration of a separate question it should seek to do so on clearly or easily established facts, or on the basis of an agreed statement of facts’..

¹¹³ This was previously explained without reference to Ch III in *Van der Meer v The Queen* (1988) 62 ALJR 656, 666. In the context of confessional evidence, Toohey, Gaudron and Gummow JJ stated that evidence should be excluded where, ‘it would be unfair to the accused to use his statement against him ... Unfairness, in this sense, is concerned with the accused’s right to a fair trial, a right which may be jeopardised if a statement is obtained in circumstances which affect the reliability of the statement’.

¹¹⁴ This principle has since been applied by the Supreme Court of South Australia. In *Rann v Olson* (2000) 76 SASR 450, 484 [189], Doyle CJ stated with reference to *Nicholas*, that if ‘one thing is clear, it is that Parliament is at liberty, as it frequently does, to make laws that affect the manner in which the courts conduct cases, the evidence that they are permitted to receive, and subject to certain limitations the effect that may or must be given to particular evidence’.

obtained illegally; overriding the rule established in *Ridgeway v The Queen*¹¹⁵ (the ‘*Ridgeway* discretion’) that the Court may exclude such evidence on public policy grounds.¹¹⁶ The provision in question (s 15x) stated that the court was to disregard evidence that narcotics were imported by a law enforcement officer in the course of a so-called ‘controlled importation’. This discretion, the appellant argued, was ‘itself an exercise of judicial power distinct from a step in the practice or procedure which governs the exercise of judicial power’.¹¹⁷ Brennan CJ (with whom the majority agreed) held that the provision did not interfere with a fair hearing as it did not ‘impede the finding of facts by a jury’;¹¹⁸ it merely increased the material available to the court by which it could determine guilt or innocence. Had the provision actually determined guilt or innocence (by removing the discretionary power to determine what was fair in the circumstances), it would have constituted an unconstitutional legislative direction of the judicial power.¹¹⁹ This aspect of the judgment in *Nicholas* is considered in more detail below.

Beyond the general requirements of the common law fair hearing rule secured in *Bass*, the constitutional reach of the fair hearing limb of the judicial process implication remains uncertain. As Chief Justice Spigelman observed in *Lodhi v R*, the ‘High Court has not recognised a right to a fair trial as a free standing right’.¹²⁰ Indeed, even the right to trial by jury – positively mandated by s 80 of the Constitution – has been

¹¹⁵ (1995) 184 CLR 19.

¹¹⁶ The South Australian case of *R v Lobban* (2000) 77 SASR 24, 35 [43] is also instructive in this area. In that case, the appellant argued that the trial judge had erred in admitting evidence (a police analysis of cannabis found in the possession of the appellant) which had been ‘mistakenly’ destroyed by the police before an independent analysis of the substance could be undertaken in accordance with s 52A of the *Controlled Substances Act 1984* (SA). The Supreme Court of South Australia Court of Criminal Appeal distinguished the *Ridgeway* discretion (which Martin J described as the ‘public policy’ discretion) from a general ‘discretion focussed upon considerations of unfairness to the accused’.

¹¹⁷ *Nicholas v The Queen* (1998) 193 CLR 173, 188 [22] (Brennan CJ).

¹¹⁸ Ibid 188 [21] (Brennan CJ).

¹¹⁹ Ibid 206 [67] (Gaudron J).

¹²⁰ *Lodhi v R* (2007) 179 A Crim R 470, [74].

interpreted narrowly by the High Court.¹²¹ Nevertheless, certain features of and limitations on the fair hearing implication can be gleaned from subsequent case law. In *Environment Protection Authority v Caltex Refining Co Pty Ltd*, a majority of the High Court limited the implication by ruling that the right against self-incrimination (while a fundamental human right) did not extend to corporations.¹²² In *Dietrich*, the High Court found that the fair hearing rule may require that a court grant a stay of proceedings in certain instances (on the facts, an indigent accused charged with a federally indictable offence was unable to secure counsel), but did not find a right to legal counsel as such.¹²³ In *Femcare Ltd v Albright*, the Federal Court found that while individuals have a right to notification of proceedings, parties to representative proceedings had no general right of notification to proceedings taken on their behalf (although it may be required in certain circumstances).¹²⁴ And, more recently, in *Rafael Cezan v The Queen*, French CJ considered that judicial inattention (the trial judge had slept through a significant portion of the hearing) may amount to a breach of the fair hearing rule:

If, by reason of sleep episodes or serious inattention, the reality or the appearance exists that a trial judge has substantially failed to discharge his or her duty of supervision and control of the trial process in a trial by jury, then enough has been made out to establish a miscarriage of justice. The question whether there has been the reality or appearance of a substantial failure by the

¹²¹ Anthony Gray, 'Mockery and the Right to Trial by Jury' (2006) 6(1) *Queensland University of Technology Law Journal* 66. The author explains, at 79-80, that s 80 has been rendered 'impotent' because Parliament has been allowed to determine arbitrarily which offences are subject to 'trial on indictment'.

¹²² *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. See Zines, above n 3, 275.

¹²³ *Dietrich v The Queen* 1992 177 CLR 292.

¹²⁴ (2000) 100 FCR 331 [54]-[84] (Black CJ, Sackville and Emmett JJ).

judge to perform his or her duty will [as with all such matters] require assessment of a number of factors.¹²⁵

As discussed in more detail below, French CJ also attempted to link the fair hearing rule with the integrity component of the judicial process implication. However, while the remainder of the High Court agreed with French CJ that, on the facts, a miscarriage of justice had arisen, they did not find it necessary to ‘develop’ or ‘amplify’ existing constitutional principles to reach this conclusion.¹²⁶

At the most, therefore, the fair hearing limb of the judicial process implication may require that parties be notified of proceedings against them; be given an opportunity to present and challenge evidence; have a right against self-incrimination (in the case of private individuals); have a right to a stay of proceedings if necessary in the interests of justice; and have a right to appropriate supervision of the trial process.

What bearing, then, do these requirements have upon the provision of judicial mediation? The simple answer is that, in the vast majority of cases, they are unlikely to have any bearing whatsoever. As the Full Court made clear in *Bass*, the requirements of the fair hearing rule relate to the ‘judicial power to effect a determination of rights’.¹²⁷ In contrast, and as noted at the beginning of Chapter 1, it

¹²⁵ (2008) 236 CLR 358, 387 [93]. This accords with the presumption that the courts will only answer constitutional question when necessary on the facts. See *Attorney-General (NSW) v Brewery Employees' Union (NSW)* (1908) 6 CLR 469, 590.

¹²⁶ Ibid 391 [110] (Hayne, Crennan and Kiefel JJ). Gummow J stated, at 389 [101], that the ‘appeals to this Court may be decided favourably to the appellants by reference to the State legislative structure and the common law of Australia respecting the character of trial by jury, without entering upon the question whether s 80 of the Constitution imposed requirements which both went beyond those of the common law and were not satisfied by the conduct of the trial of the appellants’.

¹²⁷ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

is an essential feature of mediation that the mediator does not provide a decision.¹²⁸ Thus, provided judicial mediation occurs during prehearing, the fair hearing rule is unlikely to touch judicial mediation at all. It is conceivable that judicial mediation may undermine the fair hearing rule if mediation fails and the matter proceeds to trial. In such circumstances an allegation or insinuation may have been made during mediation which, though inadmissible as evidence, influences the judge's decision. If the evidence is not formally admitted then the affected party might argue that he or she has been denied the opportunity to challenge it; contrary to accepted rules of evidence.¹²⁹ However, in such circumstances the rule against bias would provide a more appropriate avenue of appeal, as it would in reality be the possibility that the judge may not bring an impartial mind to the resolution of the dispute (on the basis of extraneous information) that would be the real concern – not the inability of the affected party to challenge the probity of evidence. The rule against bias is examined in more detail vis-à-vis judicial mediation in Chapter 8.

¹²⁸ NADRAC, *Alternative Dispute Resolution Definitions* (1997), 5. Hugh Landerkin and Andrew Pirie, 'Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?' (2003) 82(2) *Canadian Bar Review* 249, 256; Laurence Boulle, *Mediation: Principles, Process, Practice* (2005) 65.

¹²⁹ *Browne v Dunn* (1893) 6 R 67 (HL). The rule in *Brown v Dunn* supports the fair hearing rule by requiring that a party, 'put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence'. *Smith v Advanced Electrics Pty Ltd* [2005] Qd R 65, [31]-[36] (Fryberg J). Likewise, numerous principles enshrined within the *Evidence Act* are instrumental to the assurance of a fair trial, such as, for example, the 'opinion rule' and the 'credibility rule' (ss 76, 102) which exclude certain types of non-probative evidence. Indeed, the intimacy of the connection between evidentiary principles and the provision of a fair trial is such that the 'no evidence rule' (viz. that a decision affecting individual rights can be made only on the basis of probative evidence) has been recognised, from time to time, as a third, independent rule of procedural fairness. In *Mahon v Air New Zealand* [1984] AC 808, 820, for example, the Privy Council considered that the 'rules of natural justice which are germane to this appeal can, in their Lordships' view, be reduced to [the following two rules] ... The first rule is that the person making a finding in the exercise of ... a jurisdiction must base his decision upon evidence that has some probative value ... The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests may be adversely affected by it [presents]'. (Lords Diplock, Keith, Scarman, Bridge and Templeman). In *Australian Broadcasting Tribunal v Alan Bond & Ors* (1990) 170 CLR 321, 356-57, Mason CJ implicitly acknowledged the 'no evidence' rule by reference to *Mahon* and various other English decisions (although it is unclear whether His Honour viewed the rule as a principle of natural justice or as an ultra vires grounds for judicial review).

Open Justice

One final aspect of the due process component exists which may be of relevance to the development of judicial mediation. In addition to procedural fairness, it is a core feature of the common law tradition that proceedings should be held in public. In *Daubney v Cooper*, the King's Bench stated that 'it is one of the essential qualities of a Court of Justice that its proceedings should be public, and that all parties who be desirous of hearing what is going on ... have a right to be present'.¹³⁰ In the leading English case on the matter, *Scott v Scott*, the House of Lords identified open courts as, 'a sound and very sacred part of the constitution of the country and the administration of justice'.¹³¹ Open justice is also a central feature of the US judicial system. In a criminal context, the 'right' to open justice is expressly recognised in the Sixth Amendment to the US Constitution, which requires 'a speedy and public trial', and in *Richmond Newspapers Inc v Virginia* the US Supreme Court found that a public right to attend criminal trials is afforded by the First and Fourth Amendments.¹³²

Unsurprisingly, therefore, open justice has also been described as 'an axiom of Australian law'.¹³³ In *Dickason v Dickason*, a Full Bench of the High Court held that, 'there is no inherent power in a Court of justice to exclude the public in as much as one of the normal attributes of a Court is publicity, that is the admission to the public to attend proceedings'.¹³⁴ Again, in *Russell v Russell*, the High Court held that a provision of the *Family Law Act 1975* which required State courts exercising Ch III judicial power to sit in camera was beyond Parliament's legislative power, as the

¹³⁰ (1829) 109 ER 438, 440.

¹³¹ [1913] AC 417, 473 (Lord Shaw).

¹³² 448 US 555 (1980).

¹³³ Chief Justice James Spigelman, 'Seen to be Done: the Principle of Open Justice – Part 1' (2000) 74 *Australian Law Journal* 290, 293.

¹³⁴ (1913) 17 CLR 50, 51.

requirement of ‘publicity’ represents a fundamental distinction between the judicial and administrative powers.¹³⁵

There can be little doubt that open justice is also an implicit requirement in the exercise of federal judicial power.¹³⁶ In *Re Nolan; Ex parte Young*, Gaudron J expressed the view that the judicial process includes, ‘open and public enquiry (subject to limited exceptions)’.¹³⁷ In *Grollo v Palmer*, McHugh J confirmed that ‘open justice is the hallmark of the common law system of justice and is an essential feature of the exercise of federal judicial power’.¹³⁸ More recently still in *K-Generation Pty Ltd v Liquor Licensing Court*, and with specific reference to State courts vested with Ch III judicial power (*Re Nolan* involved a military tribunal, *Grollo* the *persona designata* exception), French CJ stated that open justice is ‘an essential part of the functioning of courts in Australia’.¹³⁹ Thus, legislation which requires proceedings to be held in private is likely to be invalid - subject to the ‘direction rule’, discussed below,¹⁴⁰ and various historical exceptions.¹⁴¹

¹³⁵ (1976) 134 CLR 495, 520 (Gibbs J). See also *McPherson v McPherson* [1936] AC 177, 200 (Lord Blanesburgh).

¹³⁶ Zines, above n 4, 274-75; Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’, above n 4, 261-62. Following *Fardon v Attorney General (Qld)* (2004) 223 CLR 57, however, it seems unlikely that open justice is an implied requirement in State courts. This case is examined in detail in Chapter 6.

¹³⁷ (1990) 172 CLR 460, 496. Gaudron J does not define what these limited exceptions are. Nor did Her Honour do so in *Harris v Caladine*, a judgment to which she referred when making this statement (1991) 172 CLR 84, 150-52). However, following *Harris v Caladine* one obvious exception to the requirement that the judicial process be held in public is in the case of judicial functions carried out by court officers (see Chapter 2).

¹³⁸ (1995) 184 CLR 348, 379.

¹³⁹ *K-Generation Pty Ltd v Liquor Licensing Court* (2008) 252 ALR 471 [10].

¹⁴⁰ See below nn 214-37 and accompanying text.

¹⁴¹ As Patrick Keyzer has observed, ‘the principle of open justice was always qualified’. ‘Media Access to Transcripts and Pleadings in “Open Justice”: A Case Study (2002) 2(3) *The Drawing Board* 209, 210. See also Chief Justice Beverley McLachlan, ‘Courts, Transparency and Public Confidence – To the Better Administration of Justice’ (2003) 8 *Deakin Law Review* 1. In *Cunningham v The Scotsman Publications Ltd* [1987] SLT 698, 705-706, Lord Clyde stated that ‘Of course, there must be exceptions to the general rule and these exceptions may also be found to be justified by other considerations of public interest and public policy in the administration of justice. Cases occur and circumstances may arise where it is proper for the doors of the court to be closed. Of course, too, there are practical considerations which, in the proper control and management of the court's business necessarily impose

Despite the fact that open justice and procedural fairness are both well established tenets of the judicial process, it can be difficult to discern the boundaries between them, as the former ‘furnishes a lens ... through which departures from the standards embodied in at least one limb of natural justice [the rule against bias] may be perceived’. ¹⁴² More directly, the presence of the public may prevent abuses of process from arising in the first place. As Gaudron J explained in *Nolan*:

Quite apart from the public’s right to know what matters are being determined in the courts and with what consequences, open and public proceedings are necessary in the public interest because secrecy is conducive to the abuse of power and, thus, to injustice.¹⁴³

According to Joseph Jaconelli, however, it is possible to broadly distinguish between open justice and procedural fairness:

[T]here does exist a clear conceptual distinction between the idea of natural justice and that of open justice. It is possible to imagine a situation in which a person is afforded all the rights that have ever been claimed in the name of natural justice (an oral hearing, a tribunal free of even the slightest suspicion of bias, and so on), and for the hearing nevertheless to take place behind closed doors. Conversely, one could imagine a situation of hearing being held openly, with full right of access accorded to the public and the press, yet the

some restraint on the understanding of the bystander. It would not be practicable to circulate copies of documents referred to in open court around the public benches. But these considerations should not detract from the general principle of openness in judicial proceedings’.

¹⁴² Joseph Jaconelli, *Open Justice: A critique of the open trial* (2002) 32.

¹⁴³ (1990) 172 CLR 460, 497.

person whose case is to be heard is denied the most basic elements of a fair hearing.¹⁴⁴

Thus, while the relationship between open justice and procedural fairness is a highly complex one, the essence of the distinction between them lies in the fact that the former operates principally in the public interest by providing a general right of access to judicial proceedings, whereas the latter protects individual interests by ensuring the determination of individual rights in a fair and impartial manner. This broad distinction is sufficient for present purposes.

It follows, on the basis of the preceding analysis, that if a procedure required a court to undermine the principles of open justice it would be invalid, as it could not be performed in accordance with an essential requirement of the judicial process. It is nevertheless extremely doubtful that the principles of open justice will affect the development of judicial mediation in Ch III courts. This is because, generally speaking, the ‘demands of open justice apply only to the hearing proper’.¹⁴⁵ Judicial mediation is a prehearing process. Thus, as with the fair hearing rule, the principles of open justice have little to say on the matter. The requirements of open justice are also typically greater in criminal proceedings than civil proceedings (as with the requirements of procedural fairness), and in civil proceedings:

Pre-trial business is routinely conducted in chambers, with the usual consequences that the press and public are denied admission ... The specific case of interlocutory proceedings aside, it would be difficult to adduce a

¹⁴⁴ Jaconelli, above n 142.

¹⁴⁵ Jaconelli, above n 142, 65.

reason for opening up the whole range of pre-trial procedure to public and press access.¹⁴⁶

Various civil prehearing processes are examined in Chapter 7, which may or may not be held in camera, and which are nevertheless well established incidents of the civil trial process. To the current writer's knowledge, no Australian court has ever entertained the suggestion that any of the processes discussed interfere with open justice.¹⁴⁷

Non-curial Due Process

It is necessary to highlight the fact that a significant number of recent High Court decisions concerning constitutionally implied due process have taken place in an administrative context.¹⁴⁸ These decisions confirm that all decision-makers¹⁴⁹ must provide a fair hearing which is free from bias, regardless of whether the decision-making power is exercised in a curial or non-curial context.¹⁵⁰ In substance the principles to be applied are the same in both contexts.¹⁵¹ No simple comparison can be made, however, between procedural fairness as it applies in an administrative setting and procedural fairness as it pertains to the exercise of judicial power.¹⁵² Not only does the doctrinal basis for the implication differ between these discrete contexts,

¹⁴⁶ Joseph Jaconelli, above n 142, 65-66.

¹⁴⁷ See also the analysis of committal proceedings in Chapter 3 above nn 58-64 and accompanying text.

¹⁴⁸ See, for example, *Re Refugee Review Tribunal; ex part Aala* (2000) 204 CLR 82; *Plaintiff 157/2002 v Minister for Immigration* (2003) 211 CLR 476; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

¹⁴⁹ Provided, of course, that the decision affects individual rights: *Salemi v MacKellar [No 2]* (1977) 137 CLR 396, 452 (Jacobs J); *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

¹⁵⁰ See, for example, *Abebe v The Commonwealth* (1999) 197 CLR 510, 553 [111 - 113] (Gaudron J); *Re Refugee Review Tribunal; ex part Aala* (2000) 204 CLR 82, 131-34 [132]-[140] (Kirby J).

¹⁵¹ Margaret Allars, 'Procedural fairness: disqualification required by the bias rule' (1999) 4 (3) *Judicial Review* 269, 152.

¹⁵² In *Australia Broadcasting Tribunal v Bond* (1990) 170 CLR 321 366, Deane J recognised 'the potential for confusion between an [administrative decision-maker's] obligation to act judicially and the well-settled notion of exercising judicial power'.

its ‘content’ necessarily varies in accordance with the nature of the power exercised.¹⁵³

As noted above, constitutionally implied due process derives in a curial context from the separation doctrine and serves rule of law values (namely judicial independence and impartiality) via that doctrine.¹⁵⁴ In a non-curial context the implication also serves rule of law values, but it does not flow from the requirements of Ch III or seek to preserve the independence or impartiality of the judiciary. It flows, rather, from the need to limit the exercise of executive power.¹⁵⁵ Were a statutory decision-maker to exercise decision-making functions in a manner contrary to procedural fairness (in the absence of explicit statutory language to that effect),¹⁵⁶ that exercise would constitute an error in law and an excess of jurisdiction.¹⁵⁷

The requirement that courts observe procedural fairness provides a mechanism by which judicial independence and impartiality (and thus the integrity of the judicial function) is maintained. The impartial exercise of executive power, on the other hand, is not essential to the ‘maintenance and enforcement of the boundaries of

¹⁵³ Johnson, above n 77, 71.

¹⁵⁴ Wheeler, ‘Due Process, Judicial Power and Chapter III in the High Court’, above n 3, 208-11.

¹⁵⁵ *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82, 131 [132] (Kirby J).

¹⁵⁶ Mason J, for example, has recognised ‘a common law duty to act fairly, in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations *subject only to the clear manifestation of a contrary statutory intention*’. *Kioa v West*, (1985) 159 CLR 550, 584 (emphasis added). In *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 73 [43], Gleeson CJ and Hayne J similarly noted that a statutory provision did ‘not contain “plain words of necessary intendment” which exclude the rule against bias. It is improbable in the extreme that Parliament intended that bias on the part of a delegate would not vitiate the delegate’s decisions’. See also *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 109-10, 112, 118-19; *Salemi v MacKellar [No 2]* (1977) 137 CLR 396, 401, 442; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 348-49, 362-63; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 89 (Mason CJ and Brennan J).

¹⁵⁷ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 67 [26] (Gleeson CJ and Hayne J). See also *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

federalism'.¹⁵⁸ It is the High Court's power to issue 'a writ of Mandamus or prohibition or an injunction ... against an officer of the Commonwealth',¹⁵⁹ which preserves these boundaries (and thus the rule of law) – not the requirement that Commonwealth officers exercise their powers in accordance with procedural fairness as such.¹⁶⁰

The fair hearing aspect of the due process implication in particular will differ between curial and non-curial decision-making processes.¹⁶¹ For one thing, administrative tribunals are not strictly adversarial in nature. Administrative tribunals do not adjudicate in a judicial sense (that is to say, on the basis of legal positions identified and argued by opposing litigants); they review prior administrative decisions affecting individual rights on the basis of information deemed relevant by the decision-maker.¹⁶² It follows that considerable care should be taken when

¹⁵⁸ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 276.

¹⁵⁹ *Commonwealth Constitution* s 75(v).

¹⁶⁰ *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574, 586 (Denning J); *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J); *Enfield City Corp v Development Assessment Commission* (2000) 199 CLR 135, 157 [56] (Gaudron J); *Re Refugee Review Tribunal; ex part Aala* (2000) 204 CLR 82, 134 [140] (Kirby J); *Plaintiff 157/2002 v Minister for Immigration* (2003) 211 CLR 476, 482-83 [5]-[8], (Gleeson CJ), 513-14 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

¹⁶¹ In *Kioa v West*, (1985) 159 CLR 550, 584, Mason J noted 'the need to insist on the adoption in the administrative process of fair and flexible procedures for decision-making, procedures which do not necessarily take curial procedures as their model'. Similarly, in *Abebe v The Commonwealth* (1999) 197 CLR 510, 553 [112], Gaudron J recognised 'the emergence of a rule of procedural fairness which requires "fair [but] flexible procedures ... which do not necessarily take curial procedures as their model."' See, however, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 343-44 [4]-[5] where Gleeson CJ, McHugh, Gummow and Hayne JJ explained that the 'application of the [procedural fairness] principle in connection with decision-makers outside the judicial system must sometimes recognise and accommodate differences between court proceedings and other kinds of decision-making ... These differences, however, must not obscure the fundamental principle'.

¹⁶² In *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518, 540-541 [71], Gummow and Hayne JJ stated that in 'adversarial litigation, findings of fact that are made will reflect the joinder of issue between the parties. The issues of fact and law joined between the parties will be defined by interlocutory processes or by the course of the hearing. They are, therefore, issues which the parties have identified. A review by the Tribunal is a very different kind of process. It is not adversarial; there are no opposing parties; there are no issues joined. The person who has sought the review seeks a particular administrative decision ... and puts to the Tribunal whatever material or submission that person considers will assist that claim. The findings of fact that the Tribunal makes are those that it, rather than the claimant, let alone adversarial parties, considers to be necessary for it to make its decision'.

determining the application of decisions concerning procedural fairness in an administrative setting to questions of procedural fairness in a judicial context.

Which ‘characteristics’ are essential to judicial ‘integrity’?

So far, analysis has concentrated on the judicial process implication from an individual and public rights perspective. There exists a second category of implication, however, which focuses on the need to maintain the ‘integrity’ of the judicial process from an institutional or systemic perspective. While the integrity of the judiciary may be informed by notions of procedural fairness and/or open justice (for example, a function that undermines a parties procedural rights may also, by implication, undermine integrity), the concept is potentially broader in application and may be enlivened in situations where ordinary procedural rules are not. This highly uncertain area of law is complicated by the fact that the term ‘integrity’ has been adopted in two (notionally discrete) doctrinal spheres.¹⁶³ First of all, ‘institutional integrity’ has been identified as the ‘touchstone’ of compatibility in determining the functions that may be vested in State courts by State parliaments¹⁶⁴ (the *Kable* doctrine).¹⁶⁵ Second of all, integrity has been identified as an implication of the separation doctrine; potentially limiting the functions that may be exercised by Ch III courts, or by Ch III judges acting in their private capacity.

This section examines the concept of integrity as it has developed as an implication of the separation doctrine in the context of Ch III courts. The section begins by

¹⁶³ For a concise summation of this concept in an incompatibility context see *Femcare Ltd v Albright* (2000) 100 FCR 331, [49] (Black CJ, Sackville and Emmett JJ).

¹⁶⁴ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 617 – 618 [102] (Gummow J), 629 – 630 [144] (Kirby J).

¹⁶⁵ *Kable v DPP (NSW)* (1996) 189 CLR 51.

discussing the nature of inherent jurisdiction, and goes on to demonstrate that certain functions of inherent jurisdiction have been identified as characteristics central to the integrity of the judiciary. On this basis, it is argued that the implied rights component of the judicial process implication can also be explained as an aspect of constitutionally entrenched inherent jurisdiction.¹⁶⁶ The concept of public confidence or repute is also introduced at this stage. This requirement, which ‘loomed large in a number of cases,’¹⁶⁷ has now receded into a broader constitutional requirement of independence and impartiality; a requirement which is, in turn, a core feature of integrity. The requirements of institutional integrity as an aspect of the *Kable* doctrine are considered in Chapter 6, as is the interrelationship between the principles developed by the High Court in a Ch III and State/territory context.

What is ‘inherent jurisdiction’?

While the High Court has seldom highlighted the connection between the implications drawn from Ch III and the inherent jurisdiction of the Courts, there exists

an alternative approach to rights or guarantees derived from the separation of powers ... that does not adopt a strict ‘rights based’ approach ... [T]hat alternative is to view Chapter III as entrenching the ‘inherent jurisdiction’ of the Court to protect its own processes, the effect of which would indeed be more in keeping with the absence of widespread rights or guarantees

¹⁶⁶ Lacey, above n 5.

¹⁶⁷ Zines, above n 3, 274.

contained in the Constitution, and provides a preferable basis for drawing implications from the separation of judicial power.¹⁶⁸

This proposition underpins the suggestion made in Chapter 1; that inherent jurisdiction is one of four jurisdictions necessary to maintain the rule of law. Commentaries in related areas of Ch III jurisprudence support to this view, and cast doubt upon the notion that Ch III operates directly to protect individual rights and liberties. George Winterton, for example, has concluded that:

Courts have always shown exceptional sensitivity to infringement on their domain; many of the dicta suggesting limits on parliamentary supremacy based on ‘implied freedoms’ or ‘fundamental law’, for example, have arisen in this context. The Communist Party case also fits squarely within this tradition of judicial self-preservation. As Brian Galligan has aptly remarked, ‘The Communist Party Case was not primarily about civil liberties, but about the limits of legislative and executive power and supremacy of the judiciary in deciding such questions’.¹⁶⁹

It follows that an understanding of the nature and scope of inherent (or implied) jurisdiction is prerequisite to a full appreciation of jurisprudence in this area. Once unpacked, the limited scope of inherent jurisdiction also provides an additional rationale for the demise of public confidence as a free standing constitutional principle (as the maintenance of public confidence is not historically a function of

¹⁶⁸ Lacey, above n 5, 71.

¹⁶⁹ George Winterton, ‘The Communist Party Case’ in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003), 108, 133; citing Brian Galligan, *Politics of the High Court* (1987) 203.

inherent jurisdiction). This analysis also provides much needed context to the High Court's treatment of the *Kable* doctrine; discussed at length in Chapter 6.

What, then, is 'inherent' jurisdiction? As Wendy Lacey has observed, the 'term "inherent jurisdiction" is one that few lawyers would be unfamiliar with, though it is certainly one that most lawyers would struggle to adequately define'.¹⁷⁰ In part, this is because inherent jurisdiction is 'so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits'.¹⁷¹ In very general terms, though, inherent jurisdiction can be defined as:

[T]he power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorising provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt.¹⁷²

In other words, the term 'inherent' refers to innate quality that exists in a court because of its nature as a court, irrespective of any statutory powers vested in it by Parliament. Keith Mason describes inherent jurisdiction as a 'judicial power of last resort',¹⁷³ and identifies four broad functions (or objects) served by it.¹⁷⁴ Adopting this classification, Wendy Lacey provides a list of specific inherent powers (included here as footnotes):¹⁷⁵

¹⁷⁰ Lacey, above n 5, 63.

¹⁷¹ Sir Jack Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23, 51.

¹⁷² *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7 (Menzies J).

¹⁷³ Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *The Australian Law Journal* 449, 458.

¹⁷⁴ *Ibid.*

¹⁷⁵ Lacey, above n 5, 66; citing Jacob, above n 171, Mason, above n 173, and Justice Paul de Jersey, 'The Inherent Jurisdiction of the Supreme Court' (1985) 15 *Queensland Law Society Journal* 325, 330.

- (1) Ensuring convenience and fairness in legal proceedings:¹⁷⁶
- (2) Preventing steps from being taken that would render judicial proceedings
inefficacious:¹⁷⁷
- (3) Preventing abuse of process:¹⁷⁸
- (4) Acting in aid of superior courts and in aid or control of inferior courts
and tribunals:¹⁷⁹

It will be noted that these functions are all ‘ancillary or incidental to a court’s general jurisdiction, and are, therefore, procedural nature’.¹⁸⁰ It follows that the difficulties encountered by the High Court when determining the substantive aspects of the due process implication (discussed above) could have been (or may still be) alleviated by reframing the implication in terms of an inherent power to ensure fairness and convenience in legal proceedings.¹⁸¹

¹⁷⁶ Developing rules of court and practice directions; Remedying breaches of the rules of natural justice and setting aside default orders; The power to correct, vary or extend an order to prevent injustice; The power to order that a case be heard in camera; The power to prohibit the publication of part of proceedings; The power to decline to proceed with a matter if the proceedings are not properly constituted; The power to dismiss an action for want of prosecution, including cases where a prolonged or inordinate delay means that the defendant is likely to suffer prejudice; The power to compel observance of the court’s process and obedience of and compliance with its orders; The power to punish for contempt of court, including any conduct calculated to interfere with the due administration of justice; The power to exercise protective and coercive powers over certain classes of persons (i.e. *parens patriae*, control over practitioners and officers of the Court); The right to inspect documents denied to one of the parties.

¹⁷⁷ The power to order security for costs in civil actions; The power to stay the execution of a judgment; The power to grant certain remedies including Anton Piller Orders and Mareva Injunctions.

¹⁷⁸ The power to stay or dismiss proceedings where an action is frivolous, vexatious, oppressive, or groundless; The power to stay proceedings where a more suitable alternative forum is available or has already been invoked; The power to stay proceedings where a criminal charge is pending; The power to stay proceedings for want of prosecution; The power to order a stay of proceedings, whether permanent or temporary, whether conditional or unconditional, and where such order is demanded by the circumstances of the case in order to prevent injustice.

¹⁷⁹ The power to order a stay of proceedings pending an appeal to a superior court.

¹⁸⁰ Lacey, above n 5, 64-65.

¹⁸¹ Lacey, above n 5, 71.

In Australia, the concept of inherent jurisdiction is complicated by the fact that statutory courts (such as the Federal Court, the Family Court and the Federal Magistrates Court), do not possess inherent jurisdiction in the sense that superior courts of record do. As Wilson and Dawson JJ observed in *Jackson v Sterling Industries Ltd*:

Ordinarily a superior court of record is a court of unlimited jurisdiction which means that, even if there are limits to its jurisdiction, it will be presumed to have acted within it. That is a presumption which is denied to inferior courts and is denied to a federal court such as the Federal Court.¹⁸²

Federal courts nevertheless exercise powers ‘similar to, if not identical with, inherent power’.¹⁸³ These powers, which can be referred to as ‘implied incidental’ powers, were discussed at length in the preceding Chapter. In *DJL v The Central Authority*, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ explained that the Family Court is

not a common law court as were the three common law courts at Westminster. Accordingly, it is “unable to draw upon the well of undefined powers” which were available to those courts as part of their “inherent jurisdiction”. The Family Court is a statutory court, being a federal court created by the Parliament within the meaning of s71 of the Constitution. A court exercising jurisdiction or powers conferred by statute “has powers expressly or by implication conferred by the legislation which governs it” and “[t]his is a

¹⁸² (1987) 162 CLR 612, 618.

¹⁸³ Ibid 623-24 (Deane J).

matter of statutory construction”; it also has “in addition such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred”. It would be inaccurate to use the term “inherent jurisdiction” here and the term should be avoided as an identification of the incidental and necessary power of a statutory court.¹⁸⁴

While subtle differences between inherent and implied incidental jurisdiction may exist, however, it ‘would appear that the “implied powers” of federal courts will be considered to include the powers normally associated as falling within the ambit of “inherent jurisdiction.”’¹⁸⁵ This Chapter relates to ‘Ch III courts’, which includes superior courts of record possessing inherent jurisdiction (the High Court, State supreme courts, and other State courts vested with federal judicial power), and statutory courts granted implied incidental power by Parliament (the Federal Court and the Family Court). The Federal Magistrates Court is also a Ch III court, but occupies the somewhat curious position of being neither an inferior court (with no implied incidental power), nor a superior court of record.¹⁸⁶ The Federal Magistrates Court has itself addressed this issue:

It may ... be arguable that this Court’s implied incidental powers are less than those of the Federal Court and Family Court, and, by analogy, less than the inherent jurisdiction of the courts of common law of unlimited jurisdiction. At the very least, the failure to create this Court as a “superior” court of record under the FM Act may be taken as an indication that the Federal Parliament did not intend to create this Court as a superior court of record.

¹⁸⁴ (2000) 201 CLR 226, 240-41, 268 (Kirby J).

¹⁸⁵ Lacey, above n 5, 70.

¹⁸⁶ Section 8(3) of the *Federal Magistrates Act 1999* (Cth) states that the ‘Federal Magistrates Court is a court of record and is a court of law and equity’.

Put another way it is arguable that this Court's implied incidental power to make orders necessarily incidental to its express powers is not as broad as that of the Federal Court because the Federal Court is expressed by statute to be a superior court of record. If that argument is correct it may seem anomalous to some given that this Court and the Federal Court, and this Court and the Family Court, have concurrent jurisdiction in many areas, and concurrent, but sometimes limited, jurisdiction in other areas.¹⁸⁷

For the sake of convenience, and despite the concerns expressed by the High Court in *DJL v The Central Authority*, the term 'inherent jurisdiction' is adopted here as a reference to the powers or jurisdiction possessed by any Ch III in order to satisfy the four broad functions set out above. This distinction helps to distinguish between novel functions vested in or carried out by Ch III courts (implied incidental functions), on the one hand, and the power or jurisdiction of the courts to maintain their own processes and integrity (inherent jurisdiction), on the other.

Maintaining 'Integrity'

The significance of the preceding section is that it rationalises the High Court's otherwise inconsistent approach to the requirements of judicial 'integrity'. It may also, consequently, offer some insight into how this aspect of the judicial process implication will develop.

¹⁸⁷ Original citation unknown. Referenced in Toni Lucev, 'The Federal Magistrates Court: jurisdiction, practice and procedure and cross-vesting applications' (Materials presented to Western Australian Bar Associations Bar Readers Course, 21 May 2008) <<http://www.fmc.gov.au/pubs/docs/cross-vesting.pdf>> at 13 October 2009.

In *Nicholas*, discussed above, a majority of the High Court found that s 15x of the *Crimes Act 1914* did not undermine the integrity of the judicial process. Nevertheless, Gaudron, McHugh, Kirby and Hayne JJ expressed the view that (in certain circumstance) the power of the courts to safeguard the integrity of the judicial process may exceed the reach of Parliament's legislative power. The 'circumstances' which, it was intimated, might undermine integrity, reflect certain of the broad functions of inherent jurisdiction.

McHugh J agreed with the majority that s 15x did not fall within previously established factual (rights based) scenarios, but found that the provision nevertheless offended the integrity of the judicial process. According to His Honour:

Section 15x does not contemplate a "legislative judgment" against specified individuals, nor does it serve to inflict punishment on specified persons without a judicial trial or to adjudge criminal guilt. Nor does it direct the federal courts not to make a finding concerning rights or duties that an accused person would otherwise be entitled to under the existing law or to change the direction or outcome of *pending* judicial proceedings. It does, however, direct courts exercising federal jurisdiction to disregard a fact that is critical in exercising a discretion that is necessary to protect the integrity of Ch III courts and to maintain public confidence in the administration of criminal justice.¹⁸⁸

Kirby J also considered s 15x to be invalid. His Honour began by identifying a number of considerations that might be taken into account by a court when

¹⁸⁸ *Nicholas v The Queen* (1998) 193 CLR 173, 222 [115].

determining whether a legislative provision is invalid; including the extent to which the provision is directive, public confidence, conflict with the ‘general indicia of invalidity’, and the ‘particularity of the legislation’.¹⁸⁹ Kirby J then went on, crucially, to recognise

another and more fundamental reason which sustains the judicial discretion or power in question. It is a reason that is relevant to the nature of the judicial power itself. It charts the limits upon any legislative modification of that rule. I refer to the many judicial expressions explaining the rule in terms of the right and duty of the courts to protect the integrity of their own processes and to prevent the administration of justice being brought into disrepute with consequent loss of public confidence. In the United States of America, where the separation of the judicial power under the Constitution bears many similarities to the position in Australia, the obligation of courts to “set their face against enforcement of the law by lawless means” is often expressed in constitutional terms...Upholding the integrity of the judicial system is the unavoidable obligation of courts. It cannot be surrendered to the other branches of government.¹⁹⁰

McHugh and Kirby JJ’s judgments can be distilled to reveal two broad features of integrity, and two overarching reasons for the invalidity of s 15x. First, s 15x removes certain features of the Court’s inherent jurisdiction and, second, the removal of the

¹⁸⁹ *Nicholas v The Queen* (1998) 193 CLR 173, 258 [201]. The particularity of the legislation was, in Kirby J’s view, at 260-64 [202]-[208], a significant (although not in itself sufficient) grounds for invalidity.

¹⁹⁰ *Ibid* 258 [201], 265 [213]; citing *Sorrells v United States*, (1932) 287 US 435, 457; *Sherman v United States*, (1958) 356 US 369, 380; *Bunning v Cross* (1978) 141 CLR 54, 78; *Pollard v The Queen* (1992) 176 CLR 177, 202-03; *Ridgeway v The Queen* (1995) 184 CLR 19, 31.

discretionary power to exclude evidence illegally obtained threatens to diminish public confidence in the courts. Both of these factors had featured heavily in the High Court's earlier ruling in *Ridgeway*.¹⁹¹ Gaudron J reached a similar conclusion in principle, also reflecting her earlier findings in *Ridgeway*.¹⁹² On the facts Her Honour found s 15x to be valid, but she agreed with McHugh and Kirby JJ that certain inherent powers, and the need to maintain public confidence in the courts, were both central to the nature of judicial power:

[C]onsistency with the essential character of a court and with the nature of judicial power necessitates that ... a court cannot be required or authorized to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.¹⁹³

As noted above, the power to prevent an abuse of process, the power to prevent steps from being taken that would render judicial proceedings inefficacious (both identified by Gaudron J), the power to prevent the administration of justice being brought into disrepute, and the power to safeguard the fairness of legal proceedings (identified by McHugh and Kirby JJ) are all functions of inherent jurisdiction. In contrast, the need

¹⁹¹ In *Ridgeway v The Queen* (1995) 184 CLR 19, 38, Mason CJ, Deane and Dawson JJ stated that 'the public interest in maintaining the integrity of the courts and in ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement'. The joint judgment did not directly identify public confidence as a factor, but their Honours did refer to international judgments which did. According to McHugh J, at 82-83, the 'discretion to exclude such evidence is grounded in public policy. The trial judge must weigh two aspects of the public interest. First, the judge must weigh the admission of the evidence against the public interest in convicting those who break the law in question. Second, the judge must weigh the admission of the evidence against the public interest in ensuring that public confidence in the justice system is not undermined by the perception that the courts of law condone or encourage unlawful or improper conduct on the part of those who have the duty to enforce the law'.

¹⁹² *Ibid* 62. Gaudron J had stated that the 'inherent powers of superior courts to prevent an abuse of process exist to protect the courts and their proceedings, and to maintain public confidence in the administration of justice'.

¹⁹³ *Nicholas v The Queen* (1998) 193 CLR 173, 208 [73].

to maintain public confidence in the administration of justice does not historically fall within the inherent power of the court. This aspect of Gaudron, McHugh and Kirby JJ's opinions reflects what appeared (at the time) to be a free standing constitutional principle which had, hitherto, evolved as an aspect of the so-called incompatibility doctrine.¹⁹⁴

Prior to the High Court's ruling in *Nicholas*, various commentators had expressed concern regarding the growing importance attached to public confidence as a measure of constitutional validity. Robert Orr, for example, had noted that one effect of the public confidence requirement was to place the reputation of the courts above the 'liberty of subjects'.¹⁹⁵ Elizabeth Handsley had similarly opined that, to 'base a constitutional theory about judicial independence on the maintenance of public confidence in the judiciary is to turn the doctrine on its head' (because independence requires that courts apply the law, regardless of public opinion).¹⁹⁶ In *Nicholas*, Brennan CJ said that:

To hold that a court's opinion as to the effect of a law on the public perception of the court is a criterion of the constitutional validity of the law, would be to assert an uncontrolled and uncontrollable power of judicial veto over the exercise of legislative power. It would elevate the court's opinion about its own reputation to the level of a constitutional imperative.¹⁹⁷

¹⁹⁴ This doctrine, and its implications if any for judicial mediation, are considered at length in Chapters 5 and 6.

¹⁹⁵ Robert Orr, 'Kable v DPP: Taking Judicial Protection Too Far?' (1996) 11 *Australian Institute of Administrative Law Forum* 1, 14-15.

¹⁹⁶ Elizabeth Handsley 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' (1998) 20 *Sydney Law Review* 183, 197. See also Elizabeth Handsley, 'Do Hard Laws Make Bad Cases? The High Court's Decision in Kable v DPP (NSW) (1997) 25 *Federal Law Review* 171, 175-77.

¹⁹⁷ *Nicholas v The Queen* (1998) 193 CLR 173, 197 [37] (Brennan CJ).

Hayne J agreed with Brennan CJ that the ‘courts’ opinion of what is necessary, or desirable, to preserve their reputation is not a sound test of constitutional validity’.¹⁹⁸ However, His Honour also agreed with Gaudron, McHugh and Kirby JJ that the discretionary power to exclude evidence illegally obtained is rooted in the need ‘to protect the integrity of the courts’, and that this discretion is ‘an incident of the judicial powers vested in the courts’.¹⁹⁹ On the facts, however, Hayne J found that s 15x did not interfere with the judicial process in such a manner:

I need not, and do not, decide whether there are some inherent powers of the courts which cannot be abolished ... If the rejection of evidence of illegally procured offences had been held to be inevitably required in all cases because only in that way could the reputation of the courts be protected, the question whether Parliament might change or abolish that rule might (I do not say would) have arisen. But that is not the case with this rule.²⁰⁰

It is difficult to draw any firm conclusions from *Nicholas* as regards the scope and content of the term ‘integrity’. Most of the High Court’s analysis of the concept took place in *obiter*, and a number of distinct analytical approaches can be identified in the judgments. Gaudron, McHugh, Kirby and Hayne JJ nevertheless agreed in principle that the removal of certain inherent powers may exceed Parliament’s legislative competency,²⁰¹ and this proposition appeared to lie in the need to maintain the integrity of the courts. It is far from certain which inherent powers might be protected, however, or the circumstances in which integrity might otherwise be undermined.

¹⁹⁸ *Nicholas v The Queen* (1998) 193 CLR 173, 275 [242].

¹⁹⁹ *Ibid* 272-73 [234].

²⁰⁰ *Ibid* 26 [243]-[244].

²⁰¹ Lacey, above n 4, 75-77.

Indeed, *Nicholas* demonstrates that even the most fundamental features of inherent jurisdiction can be substantially removed by Parliament without interfering with this aspect of implied judicial process (although principally for reasons of construction, as discussed below).²⁰²

Contrary to the views expressed by Brennan CJ and Hayne J, Gaudron, McHugh and Kirby JJ agreed that public confidence (or repute) represented a valid measure of legislative validity. Subsequent case law (principally in the context of State/territory legislative power) confirms that the view of Brennan CJ and Hayne J has prevailed.²⁰³ While public confidence may not (in isolation) constitute an appropriate measure of constitutional validity, however, the fact remains that notions of repute and public confidence are inextricably linked to the apprehension of bias rule,²⁰⁴ and this rule is implicit in the exercise of judicial power. Remedying breaches of natural justice is also a function of inherent jurisdiction. Thus, in *Ebner v Official Trustee*, Gleeson CJ, McHugh, Gummow and Hayne JJ explained that:

The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and

²⁰² Gummow, Hayne, Heydon and Kiefel JJ recognised this fact in *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532, 560 [39]: ‘As indicated by the result in *Nicholas v The Queen*, upholding the validity of s 15x of the *Crimes Act 1914* (Cth), there is no impermissible interference with the exercise of judicial power even by such a significant evidentiary provision displacing the common law formulated in *Ridgeway v The Queen*’. Prior to the development of the judicial process implication it was generally accepted that Parliament could remove inherent powers, although the presumption of interpretation was always against it. See, for example, *Cameron v Cole* (1944) 68 CLR 571, 589 (Rich J); *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, 252 (Deane, Dawson, Toohey and Gaudron J).

²⁰³ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 593 [23] (Gleeson CJ); 617-18 [102] (GummowJ); *Baker v The Queen* (2004) 223 CLR 513, 519 [6] (Gleeson CJ), 542 [79] (Kirby J); *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 78 [68] (Gummow, Hayne and Crennan).

²⁰⁴ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344-45 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined.²⁰⁵

Despite references to the term ‘integrity’, Gleeson CJ, McHugh, Gummow and Hayne JJ did not go so far as to classify the apprehension of bias rule as an implication of Ch III, but Gaudron and Kirby JJ did.²⁰⁶ For Gaudron J, the appearance of impartiality was central to the maintenance of public confidence in the judicial system:

Because State courts are part of the Australian judicial system created by Ch III of the Constitution and may be invested with the judicial power of the Commonwealth, the Constitution also requires ... that, for the maintenance of public confidence, they be constituted by persons who are impartial and who appear to be impartial even when exercising non-federal jurisdiction.²⁰⁷

That public confidence can no longer be considered a free standing constitutional principle is not fatal to the underlying principle expressed by Her Honour; *viz.* that the fact and appearance of impartiality is an implicit requirement *for all courts* vested with federal judicial power – whether exercising that power or not. As the appearance of impartiality is measured objectively, this invariably attracts considerations of public confidence, public opinion, and open justice. Writing extra-curially, Chief Justice Spigelman has expressed the view that:

²⁰⁵ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ); See also earlier pronouncements to this effect, including Deane J in *Webb v The Queen* (1994) 181 CLR 41, 68: ‘it is of fundamental importance that the parties to litigation and the general public have full confidence in the integrity, including the impartiality, of those entrusted with the administration of justice’.

²⁰⁶ See above nn 98-99 and accompanying text.

²⁰⁷ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 361 [81].

It is institutional legitimacy that explains one great marvel of our social system: why do the overwhelming majority of Australians obey the law, and refrain from taking the law into their own hands, even when the risk of detecting a breach is low and the application of a deterrent sanction even lower?²⁰⁸

French CJ recently made a similar point in *Rafael Cezan v The Queen* (and also attempted to extend this reasoning to the fair hearing rule):

The somewhat elusive criterion of "public confidence" is in some cases, such as the appearance of bias, subsumed in what a fair and reasonable observer would think. The courts nevertheless depend in a real sense upon public confidence in the judicial system to maintain their authority. The maintenance of that authority depends, inter alia, upon that element of the judicial process which requires that parties before the court be given and be seen to be given a fair hearing ... The appearance of a court not attending to the evidence and arguments of the parties and control of the conduct of the proceedings is an appearance which would ordinarily suggest to a fair and reasonable observer that the judicial process is not being followed.²⁰⁹

French CJ was not joined by the remainder of the High Court, who, as observed earlier, did not find it necessary to 'develop' or 'amplify' existing constitutional

²⁰⁸ Chief Justice James Spigelman, 'Seen to be Done: the Principle of Open Justice – Part II' (2000) 74 *Australian Law Journal* 378, 380.

²⁰⁹ *Rafael Cezan v The Queen* (2008) 236 CLR 358, 380-81 [71]-[72].

principles to reach this conclusion.²¹⁰ Common sense nevertheless dictates that this view is correct (whether explicit in the High Court's reasoning or not).

In summary, it is possible that the integrity of a Ch III court will be undermined if a court no longer possesses the capacity to exercise certain powers of inherent jurisdiction. However, it is uncertain which inherent powers this principle might extend to (with the exception of the power to remedy breaches of procedural fairness), or the circumstances in which integrity might otherwise be undermined. Early judicial comments regarding the importance of maintaining public confidence reflected (and have now withdrawn into) the need to maintain the fact and appearance of impartiality. Chapter 6 examines the High Court's development of institutional integrity as an aspect of the *Kable* doctrine, and concludes that the approach adopted by the High Court in that doctrinal sphere has brought the constitutional discourse full circle; reframing the fact and appearance of independence and impartiality (the underlying purpose of the separation of judicial power) as the fundamental requirement of institutional integrity.²¹¹ However, what if any implications these judgments might have for the development of the integrity component of the judicial process principle is far from clear. As explained at length in Chapter 6, the object of the *Kable* doctrine is to ensure the institutional integrity of the federal judiciary – not the integrity of State courts as such – and the High Court may apply (what appear to be) the same principles differently to a Ch III court.

²¹⁰ *Rafael Cezan v The Queen* (2008) 236 CLR 358, 391 [110] (Hayne, Crennin and Kiefel JJ). Gummow J stated, at 389 [101], that the 'appeals to this Court may be decided favourably to the appellants by reference to the State legislative structure and the common law of Australia respecting the character of trial by jury, without entering upon the question whether s 80 of the Constitution imposed requirements which both went beyond those of the common law and were not satisfied by the conduct of the trial of the appellants'.

²¹¹ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 78 [68] (Gummow, Hayne and Crennan JJ). This explanation reflects the earlier judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 343 [3].

In any event, as the following section demonstrates, future constitutional challenges to judicial mediation are unlikely to be decided by reference to the essentiality or otherwise of a particular aspect of the traditional judicial process (whether that aspect is framed in terms of individual rights, public rights, or the integrity of the judiciary). The High Court's approach in all jurisdictions (federal, State and territory) indicates that the pivotal question will be whether or not an impugned function expressly *removes* judicial discretion vis-à-vis the 'essential' feature of judicial process in question. In these matters the High Court has consistently read down provisions in favour of legislative validity,²¹² and it is for this reason, above all, that legislation or rules of court implementing judicial mediation will almost be certainly be valid.

'Reading Down' Discretionary Functions

As noted in Chapter 3, when interpreting the object of a statutory provision the courts will assume that 'Parliament did not intend to pass beyond constitutional bounds.'²¹³ It was also explained that, by virtue of this presumption, the principle that the courts should only apply law (as opposed to making it) has effectively become redundant. The same principle applies in respect of statutory provisions which have the potential to undermine the judicial process implication. In such instances the presumption may be applied in two distinct instances: to read down a provision which might otherwise constitute a statutory direction to conduct proceedings in a manner at odds with the judicial process (contrary to the 'direction' rule); or to read down a provision which

²¹² See above Chapter 3 nn 108-30.

²¹³ *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153, 180 (Isaacs J). See also *A-G (Victoria) v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J).

might otherwise constitute the vesting of a discretion so broad as to be incapable of performance in accordance with the judicial process.

The ‘Direction Rule’

The proposition that Parliament may not direct the exercise of judicial power is nothing new. It has long been recognised that the legislature cannot interfere with the judicial process in such a way as to adjudge criminal guilt,²¹⁴ and the same limitation will apply to any legislative provision which directs the exercise of judicial power. This principle is referred to here as the ‘direction rule’.²¹⁵ *Polyukhovich, Leeth, Lim* (and more recently *Nicholas*) make explicit the connection between the direction rule and the judicial process implication. As Fiona Wheeler has explained:

Just as a series of High Court decisions prior to 1920 staked the judiciary’s claim to a guaranteed minimum set of functions immune from either legislative or executive usurpation (these functions being exclusively ‘judicial’ in nature), so too the due process implication [and the requirements of integrity] secures to the courts a guaranteed measure of control over their own procedures at the expense of Parliament.²¹⁶

²¹⁴ See (in addition to *Polyukhovich, Leeth, Lim and Nicholas*): *Liyanage v R* [1967] 1 AC 259, 290-91; *Kable v DPP* (NSW) (1996) 189 CLR 51, 97 (Toohey J), 131 (Gummow J); *Kruger v Commonwealth* (1997) 190 CLR 1, 84 (Toohey J). In the context of US criminal law, ‘an enactment which imposes punishment on specified persons or members of a specified group without a judicial trial’ is referred to as a ‘Bill of Attainder’, and the same terminology has been adopted in Australia (Zines, above n 4, 282).

²¹⁵ Peter Gerangelos has referred to this limitation as the ‘direction rule’: Peter A Gerangelos, ‘The Separation of Powers and Legislative Intervention in Pending Cases’ (2008) 30 *Sydney Law Review* 61. See also Sir Anthony Mason, ‘Comment on Peter A Gerangelos, “Legislative Intervention in Pending Cases”’ (2008) 30 *Sydney Law Review* 95, 95.

²¹⁶ Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’, above n 3, 253.

In *Leeth v Commonwealth* ('*Leeth*'), Mason CJ, Dawson and McHugh JJ explained that, 'it may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.'²¹⁷ In the leading case on the matter,²¹⁸ *Chu Kheng Lim v Minister for Immigration* ('*Lim*'), a bare majority of the High Court extended the principle in *Leeth* to other aspects of the judicial process implication, stating that the Commonwealth legislative power does not extend to

the making of a law which requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power. In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form.²¹⁹

Lim concerned the validity of certain sections of Div 4B of the *Migration Act 1958* (Cth), which provided for the custody 'of certain non-citizens'. Brennan, Deane and Dawson JJ held that s 54R of the Act purported 'in unqualified terms' to prevent the judiciary from ordering the release of persons imprisoned by the Executive, and that this constituted

²¹⁷ *Leeth v Commonwealth* (1992) 174 CLR 455, 470.

²¹⁸ As Fiona Wheeler points out, the significance of *Lim* lies in the fact that 'Brennan and Dawson JJ joined with Deane J in expressly recognizing' the due process implication. Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia', above n 3, 250.

²¹⁹ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27. (Brennan, Deane and Dawson JJ). Gaudron J agreed s 54 R was invalid in a separate judgment, at 58.

a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates.²²⁰

An important distinction must nevertheless be drawn between statutory provisions which merely affect the procedures to be adopted by a court,²²¹ and the imposition of functions which effectively usurp judicial power (by determining the outcome). The former will ordinarily constitute a legitimate exercise of legislative power,²²² while the latter will not. As Isaacs J stated in *Williamson v Ah On*:

It is one thing to say, for instance, in an Act of Parliament, that a man found in possession of stolen goods shall be conclusively deemed to have stolen them, and quite another to say that he shall be deemed to have stolen them unless he personally proves that he got them honestly.²²³

The latter example would be valid (provided that it could be interpreted in a manner consistent with the judicial process implication) whereas the former would necessarily

²²⁰ (1992) 176 CLR 1, 36-37 (Gaudron and McHugh JJ in agreement; Mason CJ and Toohey J dissenting).

²²¹ *Rodway v The Queen* (1990) 169 CLR 515; *Nicholas v The Queen* (1998) 193 CLR 173.

²²² *Williamson v Ah On* (1926) 39 CLR 95, 108, 126-27, 128; *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254, 259-60, 262-63, 264; *Milicevic v Campbell* (1975) 132 CLR 307, 316.

²²³ *Williamson v Ah On* (1926) 39 CLR 95, 122.

be invalid because it directly usurps judicial power by conclusively determining the outcome. In reality, and despite the view of the joint judges in *Lim* that the Constitution is concerned ‘with substance and not mere form,’²²⁴ it is unlikely that an Act which merely amends the procedures to be adopted will be invalid. Indeed, the High Court has only held such provisions to constitute an unconstitutional direction of judicial power on a handful of occasions.²²⁵ In the vast majority of cases, suspect provisions have been read down so as not to constitute usurpations of judicial power. Even in *Lim* (one of the few occasions on which the direction rule was successfully applied), Mason CJ and Toohey J dissented on the basis that the provision in question was capable of being construed within Parliament’s legislative competence.²²⁶ Similarly, in *Polyukhovich*, Mason CJ, Dawson, Toohey and McHugh JJ²²⁷ held that a provision of the *War Crimes Act 1945* (Cth), which sought to make indictable certain acts committed in the course of the Second World War, did not usurp Commonwealth judicial power because, inter alia, the court retained the power to determine whether a person had engaged in conduct contrary to the *War Crimes Act*.²²⁸

In *Nicholas*, a majority of the High Court held that s 15x of the *Crimes Act 1914* was not invalid as it did not usurp judicial power by ultimately determining whether an action under the *Crimes Act* would succeed or fail.²²⁹ Brennan CJ, Toohey, Gaudron and Hayne JJ applied a narrow interpretation of s 15x in line with the presumption that Parliament does not intend to exceed its legislative powers. So constructed, s 15x

²²⁴ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27. (Brennan, Deane and Dawson JJ).

²²⁵ Notable occasions include *Lim* (discussed below) and *Kable v DPP* (NSW) (1996) 189 CLR 51.

²²⁶ (1992) 176 CLR 1, 14.

²²⁷ Brennan, Deane and Gaudron JJ in dissent: *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 593 (Brennan J), 631 (Deane J), 707-08 (Gaudron J)

²²⁸ *Ibid* 531-40 (Mason CJ), 650 (Dawson J), 692 (Toohey J), 721 (McHugh J).

²²⁹ *Nicholas v The Queen* (1998) 193 CLR 173, 188 [20] (Brennan CJ), 202 [53] (Toohey J), 210-11 [78]-[80] (Gaudron J), 239 [168] (Gummow J) 276 [243]-[244] (Hayne J).

did not ‘conclusively’ determine guilt or innocence, or inhibit the provision of a fair trial, and the rule in *Lim* was not engaged.²³⁰ According to Brennan CJ:

Section 15x does not impede or otherwise affect the finding of facts by a jury. Indeed, it removes the barrier which *Ridgeway* placed against tendering to the jury evidence of an illegal importation of narcotic goods where such an importation had in fact occurred. Far from being inconsistent with the nature of the judicial power to adjudicate and punish criminal guilt, s15x facilitates the admission of evidence of material facts in aid of correct fact finding.²³¹

Toohy J agreed, finding that s15x did nothing to prevent a court from excluding evidence from a controlled importation ‘on the basis of unfairness to the accused or because the prejudicial effect of the evidence outweighs its probative value’.²³² Similarly, in Gaudron J’s view, s15x did not:

direct that the consequences of the unlawful conduct be disregarded: thus, it does not require a court to disregard resultant unfairness to an accused or to the trial process. Nor does it direct that the consequences of the admission of the evidence in question be disregarded: thus, it does not require a court to ignore the tendency of the evidence to bring the administration of justice into disrepute.²³³

²³⁰ Hayne J reached a similar conclusion, finding that if ‘the rejection of evidence of illegally procured offences had been held to be inevitably required in all cases because only in that way could the reputation of the courts be protected, the question whether Parliament might change or abolish that rule might (I do not say would) have arisen. But that is not the case with this rule’. *Nicholas v The Queen* (1998) 193 CLR 173, [244].

²³¹ *Nicholas v The Queen* (1998) 193 CLR 173, 188 [20] (Brennan CJ); See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 37 (Brennan, Deane and Dawson JJ).

²³² *Nicholas v The Queen* (1998) 193 CLR 173, [46].

²³³ *Ibid* 210 [79].

Hayne J agreed with the majority that s 15x was valid. In His Honour's view, 'the legislation deals only with the reception of evidence; it does not deal directly with issues of guilt or innocence of any offence charged against those in whose prosecutions the evidence may be led'.²³⁴ As noted previously, McHugh and Kirby JJ dissented on the basis that s 15x undermined the integrity of the judicial function,²³⁵ but McHugh J did agree with the majority that s 15x did not constitute a direct usurpation of judicial power.²³⁶

The distinction between statutory provisions which affect the procedures to be adopted and the imposition of functions which effectively usurp judicial power is of the utmost importance to the development of judicial mediation, because it is 'improbable in the extreme that Parliament would in terms authorise a Chapter III court to exercise judicial power in a partial manner'.²³⁷ This proposition is borne out by the statutory language adopted in respect of the various prehearing processes analysed in Chapter 7, and the judicial mediation processes consider in Chapter 8.

²³⁴ *Nicholas v The Queen* (1998) 193 CLR 173, 277 [249]. The same approach was recently adopted by the Federal Court in *Priestley v Godwin* (2008) 172 FCR 139. [64]-[65]. Bennet J concluded as follows: 'The applicant argues that s 31A of the *Federal Court Act* is invalid on the grounds that it constitutes an impermissible intrusion by the Legislature into the judicial process. The main point of the applicant's submissions is that s 31A of the *Federal Court Act* and O 20 r 5 of the *Federal Court Rules* preclude evidence from being admitted in a contested summary dismissal application, and that s 31A directs the Court as to the outcome of that application. There is nothing in the *Federal Court Act* or the *Federal Court Rules* that prevents evidence from being admitted in a summary dismissal application. While s 31A of the *Federal Court Act* does 'lower the bar' for summary dismissal, replacing the previous test, that is not inconsistent with judicial decision-making. Section 31A does not interfere with the process of giving weight to any evidence admitted, nor does it direct the outcome to be arrived at in any particular cases'.

²³⁵ See above nn 188-91 and accompanying text.

²³⁶ *Nicholas v The Queen* (1998) 193 CLR 173, 222 [115]. Kirby J did not ultimately express a view on the issue, although His Honour did state that he favoured an approach which focused in 'substance rather than form', which may have resulted in invalidity on the facts. *Ibid* 261 [203].

²³⁷ Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia', above n 3, 260.

Procedural Discretions to be Performed Judicially

In the preceding cases it was argued (unsuccessfully for the most part) that Parliament had unconstitutionally directed the exercise of judicial power – often by enacting provisions which narrowed or removed a discretionary power of the court. There exists another category of case, however, in which the opposite is true; that is to say, in which Parliament enacts provisions which *increase* the discretionary power of the court. The discretions in question may be substantive in nature (in which case they may undermine the existing rights principle, as discussed in Chapter 3), or they may be procedural in nature (in which case they may undermine the judicial process implication). The same interpretative presumption is applied in all instances, however, and it is highly unlikely that a procedural discretion would be invalid on the basis that it is incapable of performance in accordance with the judicial process implication. This point is of the utmost significance because judicial mediation will almost certainly be implemented by provisions which increase the procedural discretion of judges; a proposition evidenced in Chapter 8.

In *Cominos v Cominos* it was argued that section 86(1) of the *Matrimonial Causes Act 1959* (Cth),²³⁸ which provided the court with the discretionary power to make such orders as it considered ‘just and equitable in the circumstances of the case’, was so wide as to amount to a non-judicial discretion.²³⁹ The High Court held unanimously that it was not, as it was ‘exercised as an incident to judicial proceedings, [and it was] committed to a court and a judicial process [was] prescribed for its exercise’.²⁴⁰ Shortly after the passage of the *Family Law Act 1975*, in *Re Watson; Ex parte*

²³⁸ Repealed by *Matrimonial Causes Act 1966* (Cth), repealed by *Family Law Act 1975* (Cth).

²³⁹ *Cominos v Cominos* (1972) 127 CLR 588.

²⁴⁰ *Ibid* 599 (Gibbs J).

Armstrong, the requirement that judges proceed without ‘undue formality’ was held to be implicitly restricted by the requirement that it be exercised ‘in accordance with legal principles’.²⁴¹ Similarly, in *Mikasa (NSW) Pty Ltd v Festival Stores*, the discretionary power to grant an injunction under the *Trade Practices Act 1965* (Cth) was held to be within Parliament’s legislative power, as, according to Gibbs J, ‘it goes without saying that in [exercising the function, the Industrial Court] must hear both parties and in other respects proceed judicially’.²⁴² In *Femcare Ltd v Albright*,²⁴³ the Federal Court applied similar reasoning to hold valid certain provisions of the *Federal Court Act 1976*, which required the court to notify parties to representative proceedings only when ‘reasonably practicable’ and not ‘unduly expensive’.²⁴⁴

More recently, the presumption that Parliament intends a function to be exercised in accordance with the judicial process has been applied in relation to broad procedural discretions comprising the Less Adversarial Trial (‘LAT’) process applied in the federal Family Law jurisdiction.²⁴⁵ In *Truman v Truman*, the Full Court of the Family Court affirmed that the LAT process gives

no warrant to compromise issues of fairness and the usual requirements must be met. These are that determinations be made impartially, on the basis of all relevant material that the parties were able to put before the trial judge, without any pre-judgment and that the parties were given an adequate opportunity to be heard.²⁴⁶

²⁴¹ *Re Watson; Ex parte Armstrong* (1976) 136 CLR 248, 257 ((Barwick CJ, Gibbs, Stephen and Mason JJ).

²⁴² *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617, 650 (Gibbs J).

²⁴³ (2000) 100 FCR 331, [84] (Black CJ, Sackville and Emmett JJ).

²⁴⁴ *Federal Court Act 1976*, s33X(2) or s33Y(5)

²⁴⁵ The LAT process is examined at length in Chapter 7 below. See nn 163-93 and accompanying text.

²⁴⁶ *Truman v Truman* (2008) 216 FLR 365, [1.63] (Bryant CJ, Kay and Thackray JJ).

This position, their Honours explained, reflects Paragraph 6.3 of Practice Direction No 2. Of 2006, which states that each ‘party has the right to be heard in keeping with the rules of natural justice and procedural fairness’. Their Honours also noted, however, that ‘the changes brought about by the LAT process not only authorise but positively encourage judges to depart further still from the adversarial model’.²⁴⁷ This point is returned to in Chapter 7. *Truman v Truman* has since been affirmed by the Full Court in *Crestin v Crestin*.²⁴⁸

Chapter 6 examines Kirby J’s consistent objections to the High Court’s interpretative approach in the application (or rather non-application) of the *Kable* doctrine.²⁴⁹ Kirby J’s view is not confined to the States and territories, and is supported by several of the judgments considered above (in particular *Leeth*²⁵⁰ and *Chu Kheng Lim*).²⁵¹ These earlier judgments collectively emphasised the importance of examining an act’s substance and effect, and rejected the mechanical interpretation of individual legislative provisions. By allowing for a purposive application of the judicial process implication, which permits that an act may be held invalid if its overriding object or effect is contrary to the Constitution’s exclusive vesting of judicial power in Ch III courts, this approach is more apt to ensure an effective separation of judicial power than the dogmatic application of a presumption in favour of validity. In addition to the advantages identified by Fiona Wheeler (outlined above), a purposive approach to legislative construction also has a greater capacity to distinguish between novel

²⁴⁷ *Truman v Truman* (2008) 216 FLR 365, [7].

²⁴⁸ (2008) 39 Fam LR 420.

²⁴⁹ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 630 [144], 632 [149], 634-35 [157], 635 [159], 631 [147]; *Baker v The Queen* (2004) 223 CLR 513, 536 [56]; *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532, 572 [84], 563 [52].

²⁵⁰ *Leeth v Commonwealth* (1992) 174 CLR 455, 486-87 (Toohey and Deane JJ).

²⁵¹ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27. (Brennan, Deane and Dawson JJ).

judicial procedures which seek to improve access to justice, on the one hand, and legislative attempts to direct (or subvert) the exercise of judicial power, on the other. This argument is developed in Chapter 6. Nevertheless, it seems highly improbable that any of the current members of the High Court will pick up the gauntlet laid down by Kirby J.

One final issue must be dealt with. In Chapter 1, it was stated that the judicial objectives of judicial mediation are opposed to the principle of *stare decisis* because a ‘successful’ system of judicial mediation will reduce the frequency of judicial decisions. It is possible, therefore, that judicial mediation could undermine the law making role of the judiciary if it significantly reduced the frequency of judicial decisions – especially in novel areas of law. As pointed out in Chapter 5, however, it seems unlikely that judicial mediation would ever displace adjudication as the judiciary’s primary function. In any event, as the doctrine of *stare decisis* has never been identified as an implied requirement of Chapter III, the issue falls outside the scope of this thesis.²⁵²

Summary of Relevant Procedural Rules implied by Ch III:

On the basis of the preceding analysis, the following rules can be identified which will determine the boundaries within which the federal judicial function can evolve (ergo the extent to which judges can mediate), and the effect that conduct which exceeds those boundaries will have upon the discretionary function exercised to that end:

²⁵² See below Ch 5, nn 125-129 and accompanying text.

(1) Federal courts cannot proceed in a manner which:

- A. unfairly interferes with a parties ability to present evidence or to challenge evidence led against him/her;
- B. prevents a party (other than parties to representative proceedings) from being notified of proceedings against them;
- C. requires a party (who is a private individual) to incriminate him/herself;
- D. has the effect of excluding members of the public from the final hearing, except in certain limited instances.

(2) Federal courts cannot be prevented from:

- A. staying proceedings if necessary in the interests of justice;
- B. ensuring the effective supervision of the trial process.

(3) Federal courts cannot proceed in a manner which:

- A. is bias, or leads to a reasonable apprehension of bias;
- B. might lead reasonable members of the public to conclude that the court is not impartial.

(4) If a function vested in the judiciary cannot be exercised in a manner consistent with the rules set out in (1), (2) or (3) the statutory provision or rule of court establishing that function will be invalid.

- (5) If a function vested in the judiciary can be exercised in accordance with the rules set out in (1), (2) or (3), the exercise of that function in a manner which undermines those rules will not invalidate the statutory provision or rule of court which establishes that function.

The preceding analysis demonstrates that rules (1) and (2) are unlikely to affect the development of judicial mediation, as they are constructed around the exercise of a court's decision-making power. It is axiomatic that these rules have little relevance to prehearing procedures in which judges have no determinative power. Rule (3) may, however, limit the extent to which federal judges may mediate, and in order to address this issue it is necessary to examine in more detail the judicial process and the nature of the judicial function. This examination is undertaken in Chapters 7 and 8. The following two Chapters consider whether opportunities exist for judges to engage in judicial mediation in their private capacity, and whether any of the implications identified in this Chapter might also apply to State or territory courts.

CHAPTER 5

THE *PERSONA DESIGNATA* EXCEPTION

Chapters 2, 3 and 4, examined the extent to which, and the manner in which, Ch III limits the functions that may be vested in Ch III courts. It was concluded that mediation functions may be vested in Ch III courts as incidental functions (in accordance with the second limb of the separation doctrine) if they can be carried out in a manner consistent with the rule against bias and the (uncertain) requirements of judicial integrity. In Chapters 7 and 8 it is shown that, in the vast majority of cases, judicial mediation will satisfy these requirements. However, a number of exceptions to the separation doctrine have also developed over the years.¹ These exceptions reflect the difficulties associated with a strict separation of judicial and non judicial functions, while remaining outwardly loyal to the separation doctrine.² This Chapter examines the ‘*persona designata*’ (‘designated person’) exception, and asks whether it might offer further opportunities for the expansion of judicial mediation in Australian courts.

¹ Once such exception permits that judicial functions may be delegated to court officers in certain circumstances. While this exception is not directly relevant to judicial mediation because it does not limit the functions that judges may perform (see David Spencer, ‘Judicial Mediators: Is the time right? – Part 2’ (2006) 17(4) *Australian Dispute Resolution Journal* 189, 190) certain of the key judgments in this area are also of relevance to the development of the *Kable* doctrine, insofar as they consider whether, or to what extent, the Commonwealth has the power to regulate the constitution of State courts. This connection is identified in Chapter 6. The primary cases are: *Le Mesurier v Connor* (1929) 42 CLR 481; *Bond v George A Bond & Co Ltd* (1930) 44 CLR 11; *R v Davison* (1954) 90 CLR 353; *Kotsis v Kotsis* (1970) 122 CLR 69; *Knight v Knight* (1971) 122 CLR 114; *Commonwealth v Hospital Contribution Fund* (1971) 122 CLR 114; *Harris v Caladine* (1991) 172 CLR 361.

² Judith Shklar has posited that the contradictions inherent to our most basic legal principles may be a necessary evil of those principles: ‘Although it is philosophically deeply annoying, human institutions survive because most of us can live comfortably with wholly contradictory beliefs. Most thoughtful citizens know that the courts act decisively in creating rules that promote political ends – to name only civil rights – of which they approve. They also insist that the impartiality of judges and of the process as a whole requires a dispassionate, literal pursuit of rules carved in marble ... If we value flexibility and accept a degree of contradiction, this paradox may even seem highly functional and appropriate’. *Legalism: Law, Morals and Political Trials* (1964), x.

The High Court's reasoning in the *Boilermakers' Case* has been noted for its legalistic approach to power separation.³ Ironically, this approach has led to the adoption of equally legalistic reasoning in order to circumvent, or 'outflank', the second limb of the separation doctrine, in order to permit the appointment of judges in administrative positions.⁴ In a Ch III context, the *persona designata* exception is premised upon a distinction between the powers vested in federal courts under s 71 of the Constitution and the judges appointed to those courts under s 72. The upshot of this distinction is that a judge may engage in a function in a private capacity that is non-judicial in nature, provided that it is not 'incompatible' with the performance of his/her judicial functions.⁵

It has been argued that the *persona designata* exception will not permit Ch III judges to mediate.⁶ This argument recognises that mediation is not an exclusively judicial function,⁷ and reasons that mediation would be incompatible with the co-exercise of judicial functions because it threatens the 'bubble of impartiality' that surrounds the judiciary.⁸ Accepting the first part of this argument, but rejecting the second, it has, alternatively, been argued that the *persona designata* exception could provide opportunities for judges to mediate, as 'the important characteristic of impartiality is an attribute required of both roles'.⁹ Both of these propositions assume that mediation

³ Fiona Wheeler, 'The *Boilermakers Case*', in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003), 166.

⁴ Patrick Lane, *A Manual of Australian Constitutional Law* (6th ed 1995), 215.

⁵ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

⁶ Phillip Tucker, 'Judges as mediators: A Chapter III Prohibition?' (2000) 11 *Australian Dispute Resolution Journal* 84.

⁷ *Ibid* 88, 89.

⁸ *Ibid* 68-70.

⁹ David Spencer, 'Judicial Mediators: Is the time right? – Part 2', above n 1, 190.

cannot be vested in Ch III courts as an incidental judicial function, and in Chapters 3 and 4 it was shown that this assumption is unfounded. This conclusion is supported by Justice Michael Moore, who has questioned whether the *persona designata* exception provides the only means by which judges can mediate.¹⁰ This Chapter agrees that the *persona designata* exception may theoretically allow mediation to be carried out by judges in their private capacity (and that this may even permit the use of evaluate techniques that would otherwise be prohibited), but argues, nevertheless, that it is preferable (and more in tune with the historically administrative nature of *persona designata* appointments) for judicial mediation to evolve as an incidental judicial function.

Incompatibility

It has already been noted that an alternative mechanism by which to limit the functions that may be vested in Ch III courts was offered by Dixon and Evatt JJ in *Lowenstein*¹¹ and Williams J in the *Boilermakers' Case*.¹² Whereas strict power separation excludes the vesting in Ch III courts of all non judicial (or incidental) functions, the incompatibility doctrine would have permitted the vesting in Ch III courts of functions falling outside this classification, provided that they were 'compatible' with judicial power. The incompatibility doctrine was ultimately cast-off in favour of the second limb of the separation doctrine,¹³ but notions of incompatibility have enjoyed resurgence in recent years, and now affect the legislative

¹⁰ Justice Michael Moore 'Judges as Mediators: A Chapter III Prohibition or Accommodation?' (2003) 14 *Australian Dispute Resolution Journal* 188, 193.

¹¹ *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 588 – 589.

¹² *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 313 (Williams J).

¹³ Although, according to Fiona Wheeler, 'in the 1970's and 1980's it appeared that the High Court might overturn the second limb and replace it with an incompatibility test'. 'Due Process, Judicial Power and Chapter III in the new High Court' (2004) 32 *Federal Law Review* 205, 211.

powers of the Commonwealth and State parliaments in two distinct ways; as an aspect of the *persona designata* exception (preventing the vesting of certain non-judicial functions in federal judges in their private capacity); and as an aspect of the *Kable doctrine* (limiting the vesting of non-judicial functions in State and territory courts).

The *Kable* doctrine, and its implications for judicial mediation in the States and territories, is examined in the following Chapter. It is important to note from the outset, however, that the implications of incompatibility may differ between these discrete doctrinal spheres. In *Kable*, Gaudron J recognised that the incompatibility concept was ‘closely related’ in both contexts, but cautioned that the

limitation on State legislative power is more closely confined [than the incompatibility condition which limits the *persona designata* exception] and relates to powers or functions imposed on a State court, rather than its judges in their capacity as individuals, and is concerned with powers or functions that are repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.¹⁴

Dawson J dissented in *Kable*,¹⁵ but His Honour’s analysis also provides a valuable insight into the essential distinction between the application of the incompatibility concept in the federal and State realms:

¹⁴ *Kable v DPP* (NSW) (1996) 189 CLR 51, 104. Brennan CJ also stated, at 68, that the ‘incompatibility qualification applied to the *persona designata* doctrine has no counterpart in the context of possible limitations on the power of a State Parliament to invest courts of the State with non-judicial powers’. His Honour’s was, however, in dissent on the principle issue in the case, applying, at 67, the traditional approach that the Commonwealth Parliament must take State court as it finds them. See also Kristen Walker, ‘*Persona Designata*, Incompatibility and the Separation of Powers’ (1997) 8 *Public Law Review* 153, 165-66.

¹⁵ *Kable v DPP* (NSW) (1996) 189 CLR 51, 83.

What is incompatible with the exercise of the judicial power of the Commonwealth by a Ch III court may not be incompatible with the exercise of the judicial power of the Commonwealth by a court which is not restricted by any separation of powers. As Grollo makes clear, the concept of incompatibility [as a limitation on the *persona designata* exception] is derived from the separation of powers and does not have a life of its own independent of that doctrine.¹⁶

Subsequent authority indicates that the requirements of incompatibility are not uniform.¹⁷ While in a sense the ‘incompatibility doctrine’ may have ‘become a “free-standing principle,”’¹⁸ therefore, no simple translation can be made between the application of that doctrine in a *persona designata* context and its implications for State courts and judges under the *Kable* doctrine. This point is not always appreciated in practice.¹⁹

The Persona Designata Exception

Kristen Walker has explained that ‘the doctrine of *persona designata* is not a new invention. It appears in the Australian legal context as early as 1874, and in the federal context in 1904 in *Holmes v Angwin*’.²⁰ In both contexts the *persona designata* exception recognises the fact that judges have long engaged in certain functions on behalf of government (such as conducting Royal Commissions and Special

¹⁶ *Kable v DPP* (NSW) (1996) 189 CLR 51, 85.

¹⁷ See below Chapter 6 n 135-216 and accompanying text.

¹⁸ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, (3rd ed 2002), 1296.

¹⁹ For example, the Full Court of the Federal Court in *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241, [93]- [119] (Weinberg, Bennett and Edmonds JJ) appeared to view incompatibility as a single overarching concept.

²⁰ Walker, above n 14, 154; citing *Ex parte Jones; Re Jones v Bates* (1874) 12 SCR (NSW) 284; *Siddons v New South Wales Shale & Oil Co Ltd* (1874) 12 SCR (NSW) 364.

Commissions of Inquiry, and issuing administrative warrants).²¹ The operation of *persona designata* in the States and territories is considered later in this Chapter. The appropriate starting point for analysis, however, given the specific requirements of the separation doctrine, is the development of *persona designata* as an exception to second limb of that doctrine. This is because:

While there exist strong views in the states on these matters [the performance by judges of non judicial functions], the propriety of the assumption by federal judges (that is, judges of the High Court and the federal courts created by the Commonwealth Parliament) of non judicial functions has always been a question not just of the conventions or ethics of judicial office but also of the demands of positive constitutional law. The High Court has held that the Commonwealth Constitution impliedly incorporates a doctrine of the separation of federal judicial power from legislative and executive power.²²

The *persona designata* doctrine was identified as an exception to the second limb in *Drake v Minister for Immigration and Ethnic Affairs*.²³ At issue was whether Davies J (a Federal Court judge) could constitute an Administrative Appeals Tribunal; an appointment which involved ‘the exercise of administrative functions which are quasi judicial in character’.²⁴ The appellant argued that the second limb of separation doctrine logically extended to judges appointed under s71, and that the relevant provisions of the *Act* were therefore unconstitutional. The Federal Court disagreed,

²¹ Justice Robert French, ‘Executive Toys – Judges and Non-judicial Functions (speech presented at the District Court Judges’ Conference, Joondalup, 11th April 2008), [63]-[64].

²² Fiona Wheeler, ‘The use of federal judges to discharge executive functions: the Justice Mathews case [Wilson v Minister for Aboriginal and Torres Strait Islander Affairs]’ (1996) 82 *Canberra Bulletin of Public Administration* 10, 10.

²³ (1979) 24 ALR 577

²⁴ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 583 (Bowen CJ and Deane J).

finding that the second limb was concerned only with the conferral of non-judicial functions on Ch III courts, and not with the conferral of non-judicial functions on Federal Court judges acting in their private capacity. Part II of the *Administrative Appeals Tribunal Act 1975* did not confer an administrative jurisdiction on a Ch III court, but on a discrete administrative body (the AAT) designed for that purpose. As Davies J's appointment to that body was in his personal capacity,²⁵ the second limb had no application:

There is nothing in the Constitution which precludes a justice of the High Court or a judge of this or any other court created by Parliament under Ch III of the Constitution from, in his personal capacity, being appointed to an office involving the performance of administrative or executive functions including functions which are quasi judicial in their nature. Such an appointment does not involve any impermissible attempt to confer upon a Ch III court functions which are antithetical to the exercise of judicial power. Indeed, it does not involve the conferring of any functions at all on such a court.²⁶

The High Court expanded the federal *persona designata* exception in *Hilton v Wells*.²⁷ In that case, the appellant argued that a provision of the *Telecommunications (Interception) Act 1979* (Cth), which authorised Federal Court judges to issue telecoms interception warrants, was invalid as it conferred an executive function on a Ch III Court. Gibbs CJ, Wilson and Dawson JJ held (Mason and Deane JJ dissenting) that the provision was valid, despite the fact that the function in question was

²⁵ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 583 – 584 (Bowen CJ and Deane J).

²⁶ *Ibid* 584 (Bowen CJ and Deane J).

²⁷ (1985) 157 CLR 57.

irrefutably executive in nature, because it conferred the function upon Federal Court judges in their personal capacity and the function in question was ‘not incompatible with their status and independence or inconsistent with the exercise of their judicial powers’.²⁸ In what Peter Hanks has described as an ‘interesting example of inverted reasoning,’²⁹ the majority found further support for this conclusion in the nature of the function itself:

[T]he question is one of construction. Where the power is conferred on a court, there will ordinarily be a strong presumption that the court as such is intended. Where the power is conferred on a judge, rather than on a court, it will be a question whether the distinction was deliberate, and whether the reference to “judge” rather than to “court” indicates that the power was intended to be invested in the judge as an individual. [T]he nature of the power conferred is [also] of importance in deciding whether the judge on whom it is conferred is intended to exercise it in his capacity as a judge or as a designated person. If the power is judicial, it is likely that it is intended to be exercisable by the judge by virtue of that character; if it is purely administrative, and not incidental to the exercise of judicial power, it is likely that it is intended to be exercisable by the judge as a designated person.³⁰

This extract is worrying in two respects. First of all, to say that if a function is judicial in nature it is ‘likely’ that Parliament intended it to be exercised by a judge acting in his/her formal capacity, is misleading. If a function is judicial in nature it cannot be vested in a judge in his/her private capacity by virtue of the first limb of the separation doctrine (because judicial functions can only be vested in Ch III courts). Thus, the

²⁸ *Hilton v Wells* (1985) 157 CLR 57, 74 (Gibbs CJ, Wilson and Dawson JJ).

²⁹ Peter Hanks, *Constitutional Law in Australia* (1991) 486.

³⁰ *Hilton v Wells* (1985) 157 CLR 57, 72-73 (Gibbs CJ, Wilson and Dawson JJ).

conclusion that a judicial function is intended to be exercised by a judge (but vested in a Ch III court) is not just ‘likely’, it is *essential* – or the provision in question will be invalid.³¹

Second of all, the proposition that Parliament may vest powers in federal judges directly (as opposed to non-judicial bodies comprising Ch III judges) is a considerable expansion on the principle expounded in *Drake*. In the latter, the Federal Court had allowed the appointment of a federal judge to an administrative body, on the basis that the *Boilermakers’ Case* was concerned only with the activities of Ch III Courts. As the *Administrative Appeals Tribunal Act* established a non-judicial tribunal, the second limb of the separation doctrine simply did not apply. In contrast, the provisions of the *Telecommunications (Interception) Act* upheld by the majority in *Hilton* did not establish a new non-judicial body to issue warrants, but vested them directly in Federal Court judges (potentially sitting in a Ch III court). Needless to say, the decision has been criticised for its potential to ‘undermine the doctrine in the *Boilermakers’ Case*’.³² According to Denise Meyerson:

[T]he Court [in *Hilton*] showed little appreciation of the interests and values served by the separation of judicial power ... A fundamental interest of citizens is that the judicial function – the adjudication of controversies in terms of law – should be in the hands of a branch of government which

³¹ This point is made explicitly by the majority judgment in *O’Donoghue v Ireland* (2008) 234 CLR 599, 626 [61] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). This is subject, however, to the exception identified which allows certain judicial functions to be exercised by court officers. See above n 1.

³² (1985) 157 CLR 57, 81 (Mason and Deane JJ). See also: Leslie Zines, *The High Court and the Constitution* (5th ed 2008), 263; Suri Ratnapala, ‘Australian Constitutional Law (2nd ed 2007), 176.

makes its decisions impartially and is both actually and apparently independent of domination or manipulation by the political branches.³³

Indeed, the potential of *Hilton* to undermine the independence and impartiality of the judiciary was a danger not lost on the minority in the case. Mason and Deane JJ noted that:

To the intelligent observer, unversed in what Dixon J accurately described — and emphatically rejected — as ‘distinctions without differences’ it would come as a surprise to learn that a judge, who is appointed to carry out a function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not acting as a judge at all, but as a private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade.³⁴

Given these difficulties, but accepting (for the sake of argument) the public interest served by having judges issue intercept warrants, it might be wondered why the majority in *Hilton* did not simply hold that the provision of intercept warrants was incidental to the exercise of judicial power.³⁵ While previous authorities had characterised this function as administrative in nature,³⁶ the ‘purposes for which the functions were characterised [by these authorities] was very different to the purpose for which the function was considered in *Hilton v Wells*, [and] in none of these cases

³³ Denise Meyerson, ‘Extra-judicial service on the part of judges: constitutional impediments in Australia and South Africa’ (2003) 3(2) *Oxford University Commonwealth Law Journal* 181, 185.

³⁴ *Hilton v Wells* (1985) 157 CLR 57, 84.

³⁵ Ratnapala, above n 32, 177.

³⁶ *Baker v Campbell* (1983) 153 CLR 52; *Brewer v Castles* (1984) 52 ALR 571.

was the character of the power seriously investigated'.³⁷ Even if such functions are properly to be regarded as administrative in nature, however, their historical association with the exercise of judicial power provides ample grounds for the conclusion that they are incidental to its exercise – just as committal proceedings, though non-judicial, may be vested in Ch III courts.³⁸

In any event, a series of cases in the 1990's have confirmed the place of the *persona designata* exception in Australian law.³⁹ In *Grollo v Palmer* – a case which Phillip Tucker has described as the 'high-watermark' of permitting judges to exercise non-judicial power⁴⁰ – the High Court at once affirmed the doctrine and limited its application to the conferral of functions which are not 'incompatible' with the performance of judicial functions.⁴¹ *Grollo* concerned the power to issue interception warrants under the *Telecommunications (Interception) Act 1979* (Cth) as amended following *Hilton*.⁴² On the facts, Heerey J (a Federal Court judge) had issued an intercept warrant relating to a Federal Police investigation involving the Appellant. His Honour subsequently heard matters at trial concerning the appellant and certain of his companies. In accordance with the *Act*,⁴³ Heerey J did not disclose his

³⁷ Ratnapala, above n 32, 177.

³⁸ *Pearce v Cocchiaro* (1977) 137 CLR 600, 609 (Gibbs CJ; Stephen, Jacobs and Aickin JJ agreeing); *R v Murphy* (1985) 158 CLR 596, 614-616 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ). See Chapter 3 generally.

³⁹ But see *Jones v Commonwealth* (1987) 71 ALR 497.

⁴⁰ Tucker, above n 6, 87.

⁴¹ (1995) 184 CLR 348.

⁴² *Telecommunications (Interception) Act 1979* (Cth), as amended by the *Telecommunications (Interception) Amendment Act 1987* (Cth). Section 39(1) of the *Telecommunications (Interception) Act 1979* (Cth) had been amended following *Hilton* so as to apply only to 'eligible judges'. Section 39 (2) requires the judge to provide consent.

⁴³ The Full Court accepted that this was a requirement of the *Act*. *Grollo v Palmer* (1995) 184 CLR 348, 366 (Brennan CJ, Deane, Dawson and Toohey JJ), 381 (McHugh J).

involvement in issuing the intercept warrant, as would ordinarily be necessary to dispel apprehended bias.⁴⁴

The Full Court confirmed that the provision of interception warrants was an administrative function,⁴⁵ but five members of the Court concluded that the *Act's* conferral of that function on Federal Court judges was nevertheless valid.⁴⁶ Brennan CJ, Deane, Dawson and Toohey JJ accepted that bias could be apprehended by virtue of the requirement that judges not disclose their involvement in the issue of interception warrants, especially given the 'large proportion of Federal Court judges who are eligible judges and who, if not involved in the issue of the warrant in the particular case, would have formed a view about the manner in which the power to issue an intercept warrant should be exercised'.⁴⁷ Nevertheless, their Honours held that this risk could be eliminated in practice, because a 'judge who has issued a warrant in a particular matter can ensure that he or she does not sit on any case to which the warrant relates'.⁴⁸ In other words, the majority applied a presumption in favour of legislative validity, finding that the legislation *could* have been performed judicially, even although, on the facts, it was not. Gummow J adopted slightly different reasoning to achieve the same result. In His Honour's view, the impugned provisions

would not extend to the discharge by the "eligible Judge" of functions as a judge exercising the judicial power of the Commonwealth. In so far as it rested upon an equitable obligation of confidence under the general law, such

⁴⁴ See below Chapter 8 nn 150-165.

⁴⁵ *Grollo v Palmer* (1995) 184 CLR 348, 360 (Brennan CJ, Deane, Dawson and Toohey JJ), 369, 378 (McHugh J), 389 (Gummow J).

⁴⁶ *Ibid* 368-69 (Brennan CJ, Deane, Dawson and Toohey JJ), 398 (Gummow J).

⁴⁷ *Ibid* 366.

⁴⁸ *Ibid*.

an obligation would be formulated in a manner which observed necessary statutory or, in this case, constitutional constraints ... [T]he ambit of the duty stops short of impeding discharge of the higher duty flowing from Ch III.⁴⁹

It will be recalled that the technique of ‘reading down’ legislation has been favoured in respect of statutory provisions affecting Ch III courts,⁵⁰ and as demonstrated in the following Chapter, the same is true of State or territory legislation affecting State or territory courts.⁵¹ The policy reason advanced in support of this approach in *Grollo*, as with the more recent case of *Thomas v Mowbray* (considered in Chapter 3),⁵² was the view that judges are better suited to making decisions affecting individual rights than the executive:

[I]t is precisely because of the intrusive and clandestine nature of interception warrants and the necessity to use them in today's continuing battle against serious crime that some impartial authority, accustomed to the dispassionate assessment of evidence and sensitive to the common law's protection of privacy and property (both real and personal), be authorised to control the official interception of communications. In other words, the professional experience and cast of mind of a judge is a desirable guarantee that the appropriate balance will be kept between the law enforcement agencies on the one hand and criminal suspects or suspected sources of information about crime on the other.⁵³

⁴⁹ *Grollo v Palmer* (1995) 184 CLR 348, 397, 398.

⁵⁰ See above Chapter 3 nn 108-127, Chapter 4 nn 226-250, and accompanying text.

⁵¹ See below Chapter 6 nn 223-246 and accompanying text.

⁵² See above Chapter 3 nn 118-130 and accompanying text.

⁵³ *Grollo v Palmer* (1995) 184 CLR 348, 367 (Brennan CJ, Deane, Dawson and Toohey JJ), 398 (Gummow J).

Recognising that the “designated person principle” could operate to undermine the doctrine of the separation of powers unless confined in some way,⁵⁴ however, and drawing on the view expressed by the minority in *Hilton*, the majority identified two limitations on Parliament’s power to confer functions on judges as designated persons:

1. Conferral must be made with the consent of the judge in question
2. Performance of the function must be compatible with the judge’s judicial functions.⁵⁵

The first of these requirements reflects the concern, raised by Mason and Deane JJ in *Hilton*, that judges must not be compelled by the government to undertake non-judicial functions.⁵⁶ As to the second, the majority established three situations in which the conferral of non-judicial functions on a judge in his/her personal capacity might be incompatible with the exercise of judicial functions:

1. [S]o permanent and complete commitment to performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable.
2. [T]he performance of non-judicial functions of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised or impaired.

⁵⁴ Wheeler, ‘The use of federal judges to discharge executive functions: the Justice Mathews case’ above n 22, 11.

⁵⁵ *Grollo v Palmer* (1995) 184 CLR 348, 364-65.

⁵⁶ *Hilton v Wells* (1985) 157 CLR 57, 85.

3. [T]he performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished.⁵⁷

McHugh J, in dissent, found it impossible to accept that the issuing of interception warrants in private and without review was a function suited to the judiciary. In His Honour's view, not only was judicial involvement in the 'exercise of invasive power by members of the executive government' contrary to the Constitution's clear demarcation of judicial power,⁵⁸ but the manner in which that function was to be performed was incompatible with the judicial function:

Under the Act, approval of a warrant is not dependent upon compliance with objective conditions precisely formulated. The persona designata is given a discretion to approve or disapprove the issue of the warrant, and the grounds to be considered are very general. Essentially, the legislation puts the persona designata in the uniform of the constable.⁵⁹

Thus, for McHugh J, the major difficulty with the *Act* lay in its requirement that judicial officers perform functions in the *manner* of the executive;⁶⁰ contrary to the strict separation of judicial and non-judicial functions required by the second limb.⁶¹

⁵⁷ *Grollo v Palmer* (1995) 184 CLR 348, 365.

⁵⁸ *Ibid* 378.

⁵⁹ *Ibid* 379.

⁶⁰ *Ibid* 378.

⁶¹ Ratnapala, above n 32, 128. See also Zines, above n 32, 254.

Of the three scenarios/limbs identified in *Grollo*, only the third has ever been considered by the High Court in detail. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* ('*Wilson*'),⁶² Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ considered that s10(1)(c) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) did not permit the appointment of Matthews J (a Federal Court judge) to the role of Ministerial reporter. The appointment reflected the requirement, incumbent upon the Minister for Aboriginal and Torres Strait Islanders (the 'Minister'), to obtain a report by a nominated person before making a declaration,⁶³ 'for the preservation or protection of a specified area [of Aboriginal Land] from injury or desecration'.⁶⁴ The majority began by restating that Ch III 'advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges'.⁶⁵ On this basis, and applying the third limb of *Grollo*, the majority concluded that Matthews J's appointment was incompatible with the performance of her judicial functions:

The performance of such a function by a judge places the judge firmly in the echelons of administration, liable to removal by the Minister before the report is made and shorn of the usual judicial protections, in a position equivalent to that of a ministerial adviser ... The function of reporting is therefore incompatible with the holding of office as a Ch III judge.⁶⁶

⁶² (1996) 189 CLR 1.

⁶³ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 10(1)(c), 10(4).

⁶⁴ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 10 (1)(a).

⁶⁵ *Wilson v Minister for Aboriginal and Torres Strait Islanders* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

⁶⁶ *Ibid* 18-19.

In so finding, the majority outlined the process of reasoning to be applied in order to determine whether ‘public confidence’, for the purposes of the third limb in *Grollo*, had been diminished:

The statute or the measures taken pursuant to the statute must be examined in order to determine, first, whether the function is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government. If the function is not closely connected with the Legislature or the Executive Government, no constitutional incompatibility appears. Next, an answer must be given to the question whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under a law ... If an affirmative answer does not appear, it is clear that the separation has been breached. The breach is not capable of repair by the Ch III judge on whom the function is purportedly conferred, for the breach invalidates the conferral of the function. If the function is one which must be performed independently of any non-judicial instruction, advice or wish, a further question arises: Is any discretion purportedly possessed by the Ch III judge to be exercised on political grounds – that is, on grounds that are not confined by factors expressly or impliedly prescribed by law?⁶⁷

The majority also identified the requirements of procedural fairness as a factor of ‘relevance’ to the determination of compatibility under the third-limb,⁶⁸ but this is not because of the effect that such a function may have upon independence and

⁶⁷ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 17.

⁶⁸ *Ibid.*

impartiality, but because ‘if a judicial manner of performance is not required, it is unlikely that the performance of the function will be performed free of political influence or without the prospect of exercising a political discretion’.⁶⁹ In other words, if a function need not be performed in accordance with judicial standards of procedural fairness, it is more likely to be classified as inherently legislative or executive in nature, indicating a legislative intention to confer the function upon a judge *persona designata*.

Kirby J, in dissent, disagreed with the majority that the function of ministerial reporter was analogous with that of a ministerial advisor; suggesting that it was, in fact, more comparable with the role of royal commissioners.⁷⁰ Proceeding on this basis, His Honour found the ‘activities of a federal judge, secretly and anonymously authorising telephonic intercepts, [to be] ... much closer to the functions of the other branches than are those of a statutory reporter’.⁷¹ Ultimately, however, His Honour’s views were informed by the belief, held by majority in *Grollo*, that ‘the special qualities of experience, reputation and integrity that a judge can bring to the office’ make judges the most suitable persons for the position.⁷² Thus, Kirby J’s dissent in *Wilson* can be seen as an endorsement of the approach adopted by the majority in *Grollo*, whereas

⁶⁹ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 17.

⁷⁰ *Ibid* 38.

⁷¹ *Ibid* 49-50.

⁷² Kristen Walker has observed that there ‘seems to be an assumption in *Grollo* that judges will act so as to safeguard the rights of the individual, so that judges are not being borrowed to give an appearance of neutrality; and any problems are to be overcome by an “appropriate practice.” In *Wilson*, on the other hand, it is said that the separation of powers doctrine “cannot be avoided by a judge choosing to adopt a procedure designed to erect a cordon sanitaire between the judge and the Legislature or the judge and the Executive Government.”... I would suggest that the two judgments are hard to reconcile in so far as the application of principle is concerned. These issues leave me the suspicion that the majority is applying an “I know it when I see it” test – or, more charitably, that there has been a change of approach since *Grollo* that simply has not been acknowledged by the court’. Above n 14, 160-61.

the majority's approach in *Wilson* can be seen as an endorsement of McHugh J's dissent in *Grollo*.⁷³

The precise meaning of the third limb must now be reconsidered in light of a series of cases which discredited 'public confidence' as an appropriate measure of legislative validity in respect of federal⁷⁴ or State legislation.⁷⁵ These cases confirm that public confidence is merely an indicator of 'integrity'. However, this does not appear to have made a substantial difference to the operation of the incompatibility condition in practice. For example, in *Hussain v Minister for Foreign Affairs* ('*Hussain*'),⁷⁶ the Full Federal Court considered whether the appointment of a Ch III judge to the Administrative Appeals Tribunal was incompatible with the nature of proceedings at security appeals hearings. These hearings, the appellant contended, allowed 'for significant interference by the Attorney-General, as the relevant Minister, in the outcome'.⁷⁷ Having assayed the relevant authorities, and by analogy with 'other purely administrative functions that Ch III judges routinely exercise,'⁷⁸ Weinberg, Bennett and Edmonds JJ held that:

There is plainly a danger that judges will have certain functions conferred upon them as designated persons so that the Government can benefit from the veneer of impartiality that they bring to the task in politically sensitive or controversial areas. If the perception arises that a judge is acting as a tool of

⁷³ Walker, above n 14, 158-59.

⁷⁴ *Nicholas v The Queen* (1998) 193 CLR 173, 197 [37] (Brennan CJ), 275 [242] (Hayne J). See above Chapter 4 nn 203-10 and accompanying text.

⁷⁵ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 593 [23] (Gleeson CJ), 617-18 [102] (Gummow J), 629-30 [144] (Kirby J). *Baker v The Queen* (2004) 223 CLR 513, 519-20 [6] (Gleeson CJ), 542 [79] (Kirby J); *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 122 [194] (Kirby J), 149 [274] (Heydon J). See below Chapter 6 nn 177 – 211 and accompanying text.

⁷⁶ (2008) 169 FCR 241 (Weinberg, Bennett and Edmonds JJ).

⁷⁷ *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241, [52].

⁷⁸ *Ibid* [151].

the executive, respect for the court and the rule of law will be diminished. However, we doubt that ordinary members of the community would regard a Ch III judge who presides over an appeal to the Security Appeals Division of the Tribunal as having compromised his or her integrity merely by following the procedures laid down in ss 39A and 39B. The Tribunal operates independently of the executive ... Further, the individual judge may exercise his or her discretion whether or not to preside over such an appeal.⁷⁹

The relevance, if any, of the ‘somewhat elusive criterion of “public confidence”’⁸⁰ to judicial mediation, is considered in Chapter 8.⁸¹

In the years since *Wilson* was decided the High Court has twice skirted the limits of the *persona designata* exception in relation to the appointment of federal and State magistrates in extradition proceedings.⁸² On neither occasion has the High Court added significantly to our understanding of the incompatibility condition or the *persona designata* exception generally, but these decisions do emphasise the broad range of administrative functions that may be vested in judges without offending the requirements of Ch III.

In *Vasiljkovic v The Commonwealth* (*‘Vasiljkovic’*), the appellant was a naturalised Australian citizen subject to an extradition request by the Croatian government, stemming from alleged criminal offences committed during the Kosovo conflict. The appellant argued that certain provisions of the *Extradition Act 1988* (Cth), which conferred a range of administrative powers on federal magistrates, were invalid.

⁷⁹ *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241, [165]-[166].

⁸⁰ *Rafael Cezan v The Queen* (2008) 236 CLR 358, 380-81 [71]-[72] (French CJ).

⁸¹ See below Chapter 8 nn 191-96 and accompanying text.

⁸² *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614; *O’Donoghue v Ireland* (2008) 234 CLR 599.

Gleeson CJ, Gummow, Hayne and Heydon JJ (Kirby J dissenting) rejected the appeal. All of the judges began by accepting, as has already been determined in *Pasini v United Mexican States*,⁸³ that extradition proceedings were an inherently administrative function.⁸⁴ As Gleeson CJ explained, extradition is ‘removal by an executive act undertaken with legislative authority; not removal by judicial decision’.⁸⁵ However, validity was not impugned on the basis that the conferral of this administrative function was incompatible with the performance of judicial functions by the magistrate in question. Rather, the crux of the appellant’s argument was that the *Act* failed to ‘interpose judicial consideration of the sufficiency of evidence warranting surrender prior to depriving a requested person of his or her liberty’.⁸⁶ The key issue for determination, therefore, was the scope of the Commonwealth’s external affairs power under s 51 (xxix) and its relationship with the Ch III. Gleeson CJ, Gummow, Hayne and Heydon JJ, found that extradition proceedings fell entirely within the external affairs power, and that the implications of Ch III therefore had no application.⁸⁷ For Gummow, Hayne and Heydon JJ this view was bolstered by the continued availability of judicial review as a check upon the exercise of the power granted.⁸⁸ Gummow and Hayne JJ concluded that:⁸⁹

To the extent that there is no prior adjudication of guilt by a domestic court, and the detention is not with a view to the conduct of such a trial by a domestic court, it may be said that the necessity and occasions for detention pending determination of surrender of the person requested to the requesting

⁸³ (2000) 200 CLR 442.

⁸⁴ *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614, 636 [58] (Gummow and Hayne JJ), 657 [145] (Kirby J); 676 [222] (Heydon J).

⁸⁵ *Ibid* 630 [35], 631 [38].

⁸⁶ *Ibid* 665 [170] (Kirby J).

⁸⁷ *Ibid* 621 [40] (Gleeson CJ), 649 [116] (Gummow and Hayne J) 676 [222] (Heydon J).

⁸⁸ *Ibid* 646 [100]-[101] (Gummow and Hayne J), [222] (Heydon J).

⁸⁹ *Ibid* 659 [149] Kirby J.

State and its judicial processes stand outside Ch III, rather than as an exception to its application.⁹⁰

This conclusion may be sufficient to justify the proposition that the judicial process does not apply to extradition proceedings – the principal question which their Honours were required to answer.⁹¹ A similar approach was traditionally adopted, and has since been rejected, as regards Parliament's territory power under s 122.⁹² However, the conclusion that Ch III has no application to extradition proceedings does not mean that *Grollo* and *Wilson* are powerless to prevent the conferral on Ch III judges of administrative functions under s 51 (xxix). As Gleeson CJ recognised:

The separation of powers works in more than one direction. It prevents the legislature and the executive from exercising judicial power. It also prevents the judiciary from exercising legislative power. Where, as here, the legislation is so obviously with respect to external affairs, and where it offends no express or implied provision of the *Constitution*, a conclusion that the legislation is not the method of dealing with extradition that has the least impact on human rights does not result in invalidity.⁹³

Gleeson CJ had earlier concluded that the *Act* provides for the performance of 'administrative functions by a judicial officer acting as persona designata'.⁹⁴ Thus, it

⁹⁰ *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614, 649 [116] (Gummow and Hayne J), 676 [222] (Heydon J).

⁹¹ *Ibid* 639 [70]. Kirby J dissented. In His Honour's opinion, at 659 [150], the involvement of the courts in extradition proceedings was in fact 'extremely limited'. His Honour went on to state, at 670 [195], that with 'respect to those who have expressed a contrary view, it is not irrelevant to examine the incidents of the detention, its circumstances and duration when deciding its actual character for constitutional purposes'.

⁹² See below Chapter 6 nn 49-134.

⁹³ *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614, 633 [41].

⁹⁴ *Ibid* 627 [28].

is implicit in His Honour's reasoning that the s 19 of the *Extradition Act* satisfies the incompatibility condition.

Section 19 of the *Extradition Act* was reconsidered in *O'Donoghue v Ireland* ('*O'Donoghue*').⁹⁵ In that case, the High Court heard three appeals to the effect that s 19(1), (9) and (10) constituted an unconstitutional attempt on behalf of the Commonwealth Parliament to impose administrative functions on State statutory office holders.⁹⁶ Put simply, it was alleged that s 19 imposed a duty on State magistrates to perform certain functions without the consent of the relevant State parliament. Gleeson CJ (in a single judgment), Gummow, Hayne, Heydon, Crennan and Kiefel JJ (in a joint judgment) found the impugned provisions valid. Their Honours found it unnecessary to determine whether the Commonwealth had the power to impose administrative obligations on State officers,⁹⁷ because s 46 of the *Crimes Act 1914* (Cth) established a valid 'intergovernmental arrangement' for the appointment of State magistrates in the same capacity as federal magistrates.⁹⁸ The validity of the conferral therefore turned upon the whether s 19 fell within the scope of this arrangement. Section 4AAA of the *Crimes Act* imposed a number of limitations upon the Commonwealth's power, including, inter alia, that such functions may only be conferred on the magistrate 'in a personal capacity,'⁹⁹ and that magistrates cannot 'be appointed to an office that does not include any judicial functions without his or her consent'.¹⁰⁰ The joint judges (Gleeson CJ in

⁹⁵ (2008) 234 CLR 599.

⁹⁶ *Contra Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, *Re Australian Education Union; Ex parte Victoria* (1955) 184 CLR 188, and *Austin v The Commonwealth* (2003) 215 CLR 185.

⁹⁷ *O'Donoghue v Ireland* (2008) 234 CLR 599, 623-626 [47 – 57] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). Gleeson CJ followed a similar approach at 617 [2].

⁹⁸ *Ibid* 629 [75].

⁹⁹ *Crimes Act 1914* (Cth), s 4AAA(2).

¹⁰⁰ *Crimes Act 1914* (Cth), s 4AAA(4).

agreement)¹⁰¹ concluded that each ‘magistrate, as a matter of federal law, is not obliged to accept the performance of the functions of a magistrate under the Act’.¹⁰² Thus, on its proper construction, s 19 merely conferred a power – it did not impose a duty.¹⁰³ At no point, however, was it suggested, by the appellant or by the majority, that s 19 might be incompatible with the exercise of judicial power. This does not necessarily mean that s 19 is compatible with Ch III, but this seems a reasonable inference to draw.¹⁰⁴

Can federal judges mediate in their private capacity?

Chapters 7 and 8 demonstrate that judicial mediation can be carried out by Ch III courts without offending against the requirements of Ch III. As such, the question whether judges can or cannot engage in judicial mediation in their private capacity is essentially moot. Is it possible, though, that the *persona designata* exception could offer an alternative vehicle for the transfer of mediation functions to judges?

Phillip Tucker has argued that judicial mediation falls foul of the third limb of *Grollo*, because it involves processes – and has the potential to place judges in positions – which pose a ‘very real threat to the “bubble of impartiality” that surrounds the judiciary and which is essential in maintaining the legitimacy of its decisions’.¹⁰⁵ He points, in particular, to the lack of appellate review, the compellability of mediators as witnesses, mediator liability, the confidentiality of mediations, and the use of private caucuses, as aspects of mediation which conflict with the values inherent in the public

¹⁰¹ *O’Donoghue v Ireland* (2008) 234 CLR 599, 629 [75].

¹⁰² *Ibid.*

¹⁰³ *Ibid.* 623[47], 626 [57], 627 [628].

¹⁰⁴ The Federal Court appears to have reached this conclusion in *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 (Weinberg, Bennett and Edmonds JJ), [116]-[118].

¹⁰⁵ Tucker, above n 6, 94.

court system.¹⁰⁶ On this basis he concludes that mediation is a non-judicial function, that is must therefore be exclusively legislative or executive, and that it is incompatible with the performance of judicial functions. This reasoning is flawed for two reasons.

First of all, although mediation is not an exclusively judicial function (because it does not involve a ‘binding and authoritative decision’),¹⁰⁷ neither is it inherently non-judicial. That being so the power to mediate may be vested in a Ch III court as an incidental function (subject to the judicial process implication). Chapter 8 demonstrates that the dangers identified by Phillip Tucker can be remedied in this context. However, because mediation is not an exclusively judicial function, it is accurate to state that mediation functions may (theoretically) *also* be vested in a judge in his/her private capacity.

Accepting, then, that mediation functions may notionally be vested in federal judges as *persona designata*, the second flaw in Phillips Tucker’s argument is his conclusion that mediation falls foul of the third limb in *Grollo*. In none of the cases in which the *persona designata* exception has been raised in a Ch III context has an impugned function been held invalid, considered, or even mentioned because of an association with any source of influence other than the government. In *Drake*, it was the conferral of quasi-judicial administrative functions on Davies J that led the Federal Court to recognise the *persona designata* exception.¹⁰⁸ In *Hilton* and *Grollo* it was the conferral of ‘purely administrative’ functions (the issue of intercept warrants) on

¹⁰⁶ Tucker, above n 6, 90-94.

¹⁰⁷ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

¹⁰⁸ (1979) 24 ALR 577, 583 (Bowen CJ and Deane J).

Federal Court judges that was in issue.¹⁰⁹ In *Wilson*, it was the appointment of Matthews J to a position ‘firmly in the echelons of administration’ that led to incompatibility.¹¹⁰ Indeed, the majority in *Wilson* explicitly ‘confined incompatibility to the area of government activity.’¹¹¹

The separation that is relevant here is separation in the performing of the particular non-judicial functions; the principle does not touch personal relationships or relationships outside the area of governmental activity between judges and those who perform legislative or executive functions.¹¹²

In *Hussain*, the Federal Court found the appointment of a Ch III judge to an executive tribunal to be permissible under *Grollo*,¹¹³ and in *Vasiljkovic* and *O’Donoghue* the appellants did not even attempt to contend that judicial involvement in extradition proceedings (an inherently administrative function) was incompatible with the co-exercise of judicial power.¹¹⁴

It follows that the third-limb of *Grollo* (if not the incompatibility condition in its entirety) has nothing to say about processes which undermine impartiality in the manner threatened by mediation because, as Justice Moore has noted, it ‘appears to be self-evident that when a judge acts as mediator he or she does not enter a domain

¹⁰⁹ *Hilton v Wells* (1985) 157 CLR 57, 72-73 (Gibbs CJ, Wilson and Dawson JJ); *Grollo v Palmer* (1995) 184 CLR 348.

¹¹⁰ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 18-19 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

¹¹¹ Gerard Carney, ‘Wilson & Kable: The Doctrine of Incompatibility – An Alternative to Separation of Powers?’ (1997) 13 *Queensland University of Technology Law Journal* 175, 181.

¹¹² *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

¹¹³ *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241, [165]-[166].

¹¹⁴ *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614; *O’Donoghue v Ireland* (2008) 234 CLR 599.

which involves, of its nature, an inappropriate melding of judicial, legislative or executive power'.¹¹⁵ David Spencer has arrived at the same conclusion:

Unlike *Wilson*, where there was a close connection with the statutory discretion of the Minister to consider the report by the judicial officer, the appointment of judicial mediators would appear to not be an integral part of, or have no such close connection with, the legislature or executive.¹¹⁶

There may be situations, as Phillip Tucker suggests, in which the government is party to a dispute, and in such situations a judge may appear to be partial towards the government.¹¹⁷ However, this does not make judicial mediation an administrative function, to be evaluated in accordance with the third limb of *Grollo*. Any such danger can therefore be remedied, as the joint judgment in *Grollo* acknowledged, by the withdrawal of the judge from the final hearing.¹¹⁸

If it is assumed for the sake of argument, however, that the third limb *does* extend to sources of influence other than the government, will judicial mediation undermine the third limb in these circumstances? Kristen Walker has described the third limb of *Grollo* as 'public confidence incompatibility'; reflecting the fact that it operates to protect the integrity of the system as a whole. As noted, public confidence is no longer a discrete test of constitutional validity, but notions of public confidence are nevertheless subsumed within the requirements of impartiality and integrity.¹¹⁹ Whether judicial mediation has the potential to undermine the integrity of the

¹¹⁵ Moore, above n 10, 193.

¹¹⁶ Spencer, 'Judicial Mediators: Is the time right? – Part 1', above n 9, 137.

¹¹⁷ Tucker, above n 6, 94-95.

¹¹⁸ *Grollo v Palmer* (1995) 184 CLR 348, 366 (Brennan CJ, Deane, Dawson and Toohey JJ).

¹¹⁹ Walker, above n 14, 159.

judiciary in this broader sense is a highly complex question, and best addressed following an analysis of that concept as it applies in the States and territories. This analysis is undertaken in the following Chapter. Chapter 8 draws together the analysis of the integrity concept undertaken in Chapters 4, 5 and 6, and demonstrates that judicial mediation is highly unlikely to undermine integrity in any doctrinal context.

The second limb of *Grollo* may be referred to as ‘judicial integrity incompatibility’;¹²⁰ reflecting the fact that it operates to protect the integrity of individual judges. The High Court’s use of the term integrity in this context is unfortunate, as it suggests a connection between the second limb of *Grollo* and the integrity concept as it has developed in respect of Ch III Courts (reflected in the third limb of *Grollo*).¹²¹ A natural reading of the second limb suggests that this is not the case, however, and that its purpose is merely to incorporate the rules governing individual judicial conduct (procedural fairness). It cannot be assumed, although it seems likely, that the restriction applicable to the third limb (that it ‘does not touch personal relationships or relationships outside the area of governmental activity’),¹²² extends to the second limb. That being so it is possible that the second limb will prohibit the performance of functions that raise a reasonable apprehension of bias by virtue of *any* association (governmental or otherwise). The relationship between judicial mediation and the rule against bias is examined at length in Chapter 8. For the reasons offered at that stage, however, it is highly unlikely that any incompatibility would arise by the virtue of the second limb either.

¹²⁰ Walker, above n 14, 159.

¹²¹ See above Chapter 4 nn 188-210.

¹²² *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

What then, and finally, of the first limb of *Grollo*? As noted above, this limb has never been applied in practice, so there is simply no way to know how ‘permanent and complete’ a commitment to the performance of non-judicial functions would be required to activate this limitation. If natural meaning is attributed to these words, though, might the first limb have implications for judicial mediation? In answering this question, it is necessary to begin by reiterating the fact that judicial mediation, as defined in Chapter 1, is an ‘integrated’ prehearing process.¹²³ Whether this integration is achieved by vesting mediation as an incidental function, or by conferring mediation functions on judges *persona designata*, it is not suggested that judges should be encouraged or permitted to mediate for personal financial reward. Not only would this be likely to undermine judicial integrity by raising a palpable conflict of interest between the performance of their judicial functions and their personal financial interests, it could effectively sap from the judiciary the exclusive power, ‘to decide controversies between its subjects, or between itself and its subjects’.¹²⁴ This point is returned to below.

The only concern as regards the first limb, therefore, is that the performance of judicial mediation as a prehearing function might result in so permanent and complete a commitment to non-judicial functions as to render the ‘further performance’ of a judge’s ‘substantial judicial functions’ impracticable. This is also unlikely to occur, for two reasons. The first reason is that judicial mediation is only one of many devices in the judiciary’s prehearing arsenal; it is not a substitute for the existing judicial process. According to Chief Justice Black:

¹²³ See above Chapter 1 nn 30-36.

¹²⁴ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

The short- to medium-term future is not ... in my opinion, likely to involve a radical change in the system of ADR used by the Court ... I take this view about the likely future of ADR in the Court because, to my mind, the existing system has served well the interests of the litigants who have agreed to take part in it. It has assisted them and it has assisted the Court.¹²⁵

This proposition is supported by Justice Moore, in whose view it

is probable that for any particular judge, the time that would be devoted to mediation would be limited ... because of pressure within courts to resolve by traditional determination, the ordinarily lengthy list of cases which are not settled (whether by mediation or otherwise) ... [E]ven if, as I believe is the case, there is no constitutional impediment to judges acting as mediators, there will not be a wholesale assumption of that role by the judiciary. It is a role that is likely to be taken up sparingly.¹²⁶

Of course, judicial mediation may become so popular, and/or effective, as to prove these learned opinions wrong. A court may also choose to assign certain judges to judicial mediation for practical reasons.¹²⁷ As pointed out in Chapter 8, it is common for a court's judicial mediation functions to be kept rigidly separate from its adjudicative functions, in order to ensure confidentiality.¹²⁸ This may lead to a division of judges in a given registry between mediation and non-mediation roles, with the former engaging 'permanently and completely' in judicial mediation.¹²⁹ Even if this occurs, however, it may be hard to rationalise the conclusion that judicial

¹²⁵ Chief Justice Michael Black; 'ALJ Forum: Mediation' (1993) 67 *Australian Law Journal* 941, 941.

¹²⁶ Moore, above n 10, 195, 197.

¹²⁷ Tucker, above n 6, 88.

¹²⁸ See below Chapter 8 nn 144-54 and accompanying text.

¹²⁹ Tucker, above n 6, 88.

mediation is incompatible with the first limb for this reason, when judges have historically taken what are, in effect, full time positions in non-judicial roles. Kristen Walker has argued that:

[I]f we are to take serious this form of incompatibility, then we must surely question the validity of the appointment of a Federal Court judge to the Administrative Appeals Tribunal, the National Crime Authority, the Social Security Appeals Tribunal and other administrative tribunals which involve a judge detaching from her court and operating as a full-time tribunal head. Furthermore, lengthy Royal Commissions may also fall foul of practical incompatibility, as would overseas postings such as those accepted by Dixon and Latham during World War II.¹³⁰

Such distinctions may offer little resistance in practice, given that the majority in *Wilson* simply glossed over the analogy drawn by Kirby J between ministerial advisors and royal commissioners.¹³¹ Nevertheless, it seems extremely doubtful that any of the three limbs in *Grollo* will prevent Australian judges from engaging in judicial mediation in their private capacity. Indeed, it is possible that the incompatibility doctrine would be permissive of a wider array of mediation activities than would the separation doctrine (because the separation doctrine excludes *all* non-judicial (or incidental) functions).

¹³⁰ Walker, above n 14, 162.

¹³¹ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 18-19 (Brennan CJ, Dawson, Toohey, McHugh), 38 (Kirby J).

Does Grollo apply to State or territory legislation?

It has been noted that the *persona designata* doctrine has a long history at the State level, and that the incompatibility condition developed in *Grollo* applies only to Ch III courts. In *Kable v DPP*, however, McHugh J expressed the view that, following the ruling in that case, the incompatibility condition may have implications for State judges acting in their private capacity (contrary to the traditional view that the Constitution has no effect upon the power of State parliaments in this regard).¹³² In His Honour's view,

although nothing in Ch III prevents a State from conferring executive government functions on a State court judge as *persona designata*, if the appointment of a judge as *persona designata* gave the appearance that the court as an institution was not independent of the executive government of the State, it would be invalid.¹³³

Consistent with the narrow application of the limits placed upon the *persona designata* exception in *Grollo*, however, McHugh J went on to confine this aspect of *Kable* to the area of government activity:

No doubt there are few appointments of a judge as *persona designata* in the State sphere that could give rise to the conclusion that the court of which the judge was a member was not independent of the executive government. Many Chief Justices, for example, act as Lieutenant-Governors and Acting Governors. But, given the long history of such appointments, it is impossible

¹³² *Kable v DPP* (NSW) (1996) 189 CLR 51, 117-18.

¹³³ *Ibid.*

to conclude that such appointments compromise the independence of the supreme courts or suggest that they are not impartial. Similarly, a law that provided for a judge of a State court to be appointed as a member of an Electoral Commission fixing the electoral boundaries of the State would not appear to suggest that the court was not impartial. However, a State law which purported to appoint the Chief Justice of the Supreme Court to be a member of the Cabinet might well be invalid because the appointment would undermine confidence in the impartiality of the Supreme Court as an institution independent of the executive government of the State.¹³⁴

McHugh J was the only judge in *Kable* to make this suggestion, but in any event the doctrine is unlikely to significantly affect the ability of State parliament's to vest mediation functions in State judges acting as *persona designata*. If the analysis in the preceding section is correct, and federal judges can engage in judicial mediation in their private capacity, then there is even less reason why State judges should not do so.¹³⁵ Kristen Walker has concluded that 'the incompatibility condition is different from that applied to federal judges and is extremely weak'.¹³⁶ Likewise, Peter Johnston as Rohan Hardcastle have observed that McHugh J appeared to assume 'a more relaxed incompatibility test for State judges than that applied to federal judges'.¹³⁷ Justice French (as he then was) has also suggested extra-curially that any finding of incompatibility in this context would 'no doubt have to be an extreme case

¹³⁴ *Kable v DPP* (NSW) (1996) 189 CLR 51, 117-18.

¹³⁵ The same reasoning applies to Territory judges: *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

¹³⁶ Walker, above n 14, 166.

¹³⁷ Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216, 230.

in terms either of the nature of the function or the extent to which it impaired the capacity of the judge to carry out a judicial function'.¹³⁸

These views are supported by State authority. In *Kotzmann v Adult Parole Board Victoria*,¹³⁹ the appellant contended that a provision of the *Corrections Act 1986* (Vic) was invalid on the grounds, inter alia, that it required the appointment of a judge of the Supreme Court of Victoria to the Victorian Parole Board.¹⁴⁰ This position, the appellant argued, was, 'incompatible with the office of a judge of such a court'.¹⁴¹ Judd J noted that the 'persona designata doctrine, as an answer to the constraints on legislative power under the *Boilermakers*' doctrine, is a uniquely federal doctrine which has only limited application in the present case'.¹⁴² That being so, His Honour explained, the only question is 'whether the doctrine of "incompatibility", which imposes constraints on the federal doctrine of persona designata, precludes a judge of the Supreme Court from serving as a member of the Board'.¹⁴³ His Honour accepted a number of propositions, which in his view 'emerged' from the existing authorities.¹⁴⁴ In particular, Judd J accepted that incompatibility would arise at the State level, 'if a discretion is to be exercised by a judge on political grounds, that is, grounds that are not confined by factors expressly or impliedly prescribed by law'.¹⁴⁵ In answering this question, His Honour explained, 'a relevant consideration is the extent to which the function is to be performed without bias and by a procedure that gives each interested

¹³⁸ French, above n 21, [95].

¹³⁹ [2008] VSC 356 (Unreported, Judd J, 15 September 2008).

¹⁴⁰ *Kotzmann v Adult Parole Board Victoria* [2008] VSC 356 (Unreported, Judd J, 15 September 2008), [11].

¹⁴¹ *Ibid.*

¹⁴² *Ibid* [31].

¹⁴³ *Ibid* [33].

¹⁴⁴ *Ibid* [43].

¹⁴⁵ *Ibid.*

person an opportunity to be heard'.¹⁴⁶ While Judd J accepted the limitations imposed by *Kable*, however, on the facts he identified a number of factors that pointed to the conclusion that the impugned provision did 'not give the appearance that this court, as an institution, is not independent of the executive government'.¹⁴⁷

Should Australian judges engage in judicial mediation in their private capacity?

Insofar as the incompatibility condition established in *Grollo*, 'is not a total prohibition but catches only those non-judicial functions which are incompatible with or repugnant to the judicial function in some way',¹⁴⁸ the *persona designata* exception may allow a broader range of mediation functions to be carried out by Ch III judges than could be vested in Ch III courts. State and territory judges may also be permitted to engage in a wider variety of mediation functions in their personal capacity than could be vested in State or territory courts by virtue of the *Kable* doctrine.¹⁴⁹ It is submitted, nevertheless, that it is preferable to adopt an approach to judicial mediation which sees the practice developed as an incidental judicial function. There are two interconnected reasons for this submission.

First of all, the doctrinal basis of the *persona designata* exception is dubious; both theoretically and practically. It undermines the separation doctrine, and pays lip

¹⁴⁶ *Kotzmann v Adult Parole Board Victoria* [2008] VSC 356 (Unreported, Judd J, 15 September 2008), [43].

¹⁴⁷ *Truman v Truman* (2008) 216 FLR 365, [50].

¹⁴⁸ Walker, above n 14, 165.

¹⁴⁹ Kristen Walker observes that '*Kable* can be contrasted with *Grollo*: in the former, we cannot use judges because of the public perception of the judiciary, notwithstanding the role the judge may play in the protection of individual rights; in the latter, we can use judges because of the need to protect individual rights, notwithstanding the effect this may have on public perception of the judiciary and the potential problems that may arise from the way the power is exercised'. Above n 14, 167.

service to values served by it. This view is supported extra-curially by the current, and at least one former, Chief Justice of Australia.¹⁵⁰ Sir Anthony Mason has expressed the view that:

The concept of *persona designata* has a distinctly artificial flavour about it. The concept, which would have appealed to mediaeval schoolmen, has been criticised on the ground that it contemplates the judge acting in his character at large, detached from the court of which he is a member. The concept has little to commend it.¹⁵¹

Justice French (as he then was) has also observed that ‘the boundary line dividing functions compatible with the exercise of a federal judicial commission and functions incompatible is not informed by any particular coherent body of principle’.¹⁵² In light of these views, and from the standpoint of principle and practicality, it seems reasonable to suggest that the *persona designata* exception should, at the very least, be applied cautiously (and by confining its application to the conferral of certain administrative functions).

This proposition underlines the second reason that judicial mediation should not be conferred on judges in their personal capacity. Not only is judicial mediation *not* an inherently administrative function, it is a form of *dispute resolution*, and the power to

¹⁵⁰ Kristen Walker has similarly commented critically on ‘the deleterious impact’ that the exception has ‘on the constitutional separation of powers and thus the outcome that that doctrine is intended to achieve’. Above n 14, 162.

¹⁵¹ Sir Anthony Mason, ‘A New Perspective on Separation of Powers’ (1996) 82 *Canberra Bulletin of Public Administration* 1, 5.

¹⁵² French, above n 21, [85].

resolve disputes is, historically at least, an exclusively judicial function.¹⁵³ Chief Justice Spigelman was undoubtedly correct when he stated that ‘it is not appropriate to assess the judicial system as if it was merely a publicly funded provider of dispute resolution services,’¹⁵⁴ but it is through the resolution of disputes that the judiciary’s broader social and governmental functions are realised (such as regulating the boundaries of federalism, developing the common law, and regulating social norms and procedures)¹⁵⁵ A similar argument was raised in *Vasiljkovic*, albeit rejected on the basis that, as the function in question (participation in extradition proceedings) fell exclusively within Parliament’s external affairs power, it fell outside the reach of Ch III judicial power. However, no such disjunction exists between Ch III and Parliament’s legislative power under ss 51 (xxiv) and (xxxix), and it is from this head of legislative power that judicial mediation will spring.¹⁵⁶

¹⁵³ See above Chapter 3 nn 7-18 and accompanying text. Ultimately, of course, judicial power is the power to finally determine disputes (not merely to assist in their resolution), but the judicial function cannot be determined solely by reference to the final judicial act. This simple truism was recognised by Windeyer J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 398. It is still accurate to state in more general terms, therefore, that at ‘the heart of the judicial functions is the resolution of disputes and controversies’. Moore, above n 10, 190.

¹⁵⁴ Chief Justice James Spigelman, (An untitled speech delivered to the Compensation Court Annual Conference, Sydney, 7 May 1999). See also John Leubsdorf ‘The myth of civil procedure reform’ in Sergio Chiarlioni, Peter Gottwald and Adrian Zuckerman (ed), *Civil justice in crisis: Comparative perspectives of civil procedure* (1999), 67.

¹⁵⁵ Australian Law Reform Commission, ‘Managing Justice: A Review of the Federal Civil Justice System’ Report No 89 (2000), [1.101]. The ALRC stated that court ‘rulings provide statements of “social purpose ... the proper meaning to our public values”’. The legal system affords mechanisms by which society monitors and regulates its incessant change. See also Sir Gerard Brennan, ‘Farewell to the Honourable Sir Gerard Brennan AC, KBE’ (1998) 5 *Australian Bar Gazette* 1, 7. For an analysis of the perceived and actual effect of court ruling on the development of social norms, see: Justice Ronald Sackville, ‘Courts and Social Change’ (2005) 33 *Federal Law Review* 373, 373; Justice Kenneth Hayne, ‘Concerning Judicial Method – 50 Years On’ (Paper presented at the Fourteenth Lucinda Lecture, Monash University Law School, 17 October 2006). From a US perspective, see: Marc Galanter ‘The radiating effects of courts’ in Keith Boyum and Lynn Mather (eds) *Empirical theories about courts*, (1983) 121, 124-27; Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991); Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2004); Robert L Carter, ‘The Warren Court and Desegregation’ (1968) 67 *Michigan Law Review* 237; Aryeh Neier, *Only Judgment: The Limits of Litigation in Social Change* (1982).

¹⁵⁶ See above Chapter 2 nn 216-19 and accompanying text.

It might be argued in response that the courts do not provide the most appropriate,¹⁵⁷ or even the most widely used,¹⁵⁸ forum for the vast majority of dispute resolution. But the fact remains that the judiciary has jealously preserved the ability to regulate private dispute resolution through, amongst other things, the exercise of supervisory jurisdiction.¹⁵⁹ In a similar vein, the second limb of the separation doctrine protects the inherent jurisdiction of the courts and reflects the need to insulate the judicial process from Parliamentary interference.¹⁶⁰ Judicial mediation raises fundamental questions about the nature of the judicial process, and its limits are properly to be determined in this context. If judicial mediation were implemented by Parliament in a manner that circumvents the judicial process (and the protections afforded by it) the opportunity for the judiciary to determine these important issues – and for the High Court to secure its Constitutional imperatives – would be lost. Indeed, if judicial mediation were to prove successful, the *persona designata* exception could effectively transfer an important part of the judicial function (ergo judicial power) to Parliament.

¹⁵⁷ Stephen Crawshaw, 'The High Court of Australia and advisory opinions' (1977) 51 *Australian Law Journal* 112, 123.

¹⁵⁸ See above Chapter 1 nn 185-208 and accompanying text.

¹⁵⁹ See above Chapter 2 nn 51-76 and accompanying text.

¹⁶⁰ See above Chapter 4 nn 166-69 and accompanying text.

CHAPTER 6

CH III IMPLICATIONS FOR STATE AND TERRITORY COURTS

The High Court has traditionally adopted the view that the Commonwealth Parliament must take State court as it finds them.¹ The Constitution does not require a separation of power in the States, and there is authority ‘in nearly every State that no binding doctrine of separation of powers [can] be derived from their respective State Constitutions.’² As a result (and with certain exceptions), the implications drawn from Ch III have not been seen to limit the functions that may be vested in State courts by State parliaments. Territory courts have also been considered immune to the implications of Ch III on the basis that they are constituted and governed solely within s 122 (the ‘territories’ power), which is contained in Ch V.³ This state of affairs was always a threat to the High Court’s role as the guardian of the Constitution. It provided the High Court with no power to compel the maintenance of appropriate standards in State supreme courts (so as to ensure their fitness for the exercise of federal judicial power), and guaranteed no avenue of appeal from the territories to the High Court.

¹ *Federated Sawmill, Timberyard and General Woodworkers’ Employees’ Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308.

² Gerard Carney, ‘Wilson & Kable: The Doctrine of Incompatibility – An Alternative to Separation of Powers?’ (1997) 13 *Queensland University of Technology Law Journal* 175; citing NSW: *Clyne v East* (1967) 68 SR(NSW) 385, 395, 400; *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381, 407, 410, 419 - 420. Victoria: *Collingwood v Victoria (No 2)* [1994] 1 VR 652. South Australia: *Gilbertson v South Australia* (1976) 15 SASR 66, 85; *Grace Bible Church v Reedman* (1984) 36 SASR 376. Western Australia: *JD & WG Nicholas v Western Australia* [1972] WAR 168.

³ *Buchanan v Commonwealth* (1913) 16 CLR 315; *R v Bernasconi* (1915) 19 CLR 629, 635 (Griffith CJ); 640 (Gavan Duffy and Rich JJ); *Mitchell v Barker* (1918) 24 CLR 365.

In recent years, however, this threat has been assuaged by the convergence of two streams of High Court precedent.⁴ The first stream asserts the High Court's power (as an implication of Ch III) to strike-down legislation which is 'incompatible' with the vesting of federal judicial power in State courts (the '*Kable* doctrine').⁵ The second stream brings territory courts within the general umbra of Ch III (the *Spratt* stream) and the *Kable* doctrine.⁶

This Chapter examines these convergent streams of precedent, and the interrelationship between them. It demonstrates that the *Kable* doctrine is highly unlikely to impede the implementation of judicial mediation in the States and territories. While initially there may have been a belief that the *Kable* doctrine established a free-flowing conduit for the transfer of Ch III implications to State and territory courts, the High Court has so narrowed the circumstances in which incompatibility will arise (principally by applying a presumption in favour of validity) that all but the most extreme usurpations of judicial power will be permitted. It is argued, in light of the High Court's expansive interpretation of s 122, and having regard to the conclusions reached in Chapter 4 as to the importance of maintaining certain features of inherent jurisdiction,⁷ that the overriding object of *Kable* was, in fact, to secure the effective operation of the High Court's appellate jurisdiction.

⁴ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

⁵ *Kable v DPP* (NSW) (1996) 189 CLR 51.

⁶ *Spratt v Hermes* (1965) 114 CLR 226. There are a few specific exceptions to this proposition. In particular, it would appear that ss 72 and 80 still have no application to the supreme courts of the territories: *R v Bernasconi* (1915) 19 CLR 629; *Spratt v Hermes* (1965) 114 CLR 226; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

⁷ See above Chapter 4 nn 188-210.

The Kable doctrine

In *Kable*, the High Court adopted a test of incompatibility to strike down an *Act* of the New South Wales Parliament on the basis that it compromised the integrity of the Supreme Court of New South Wales and, in turn, the institutional integrity of the Australian judiciary.⁸ *Kable* concerned the validity of s 5(1) of the *Community Protection Act 1994* (NSW), which purported to facilitate the continued detention of a prisoner who, whilst incarcerated for the manslaughter of his wife, had written letters threatening to harm his children and his deceased wife's sister. Section 5(1) provided that:

- (1) The object of this Act is to protect the community by providing for the preventive detention (by order of the Supreme Court made on the application of the Director of Public Prosecutions) of Gregory Wayne Kable.
- (2) In the construction of this Act, the need to protect the community is to be given paramount consideration.
- (3) This Act authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person.
- (4) For the purposes of this section, Gregory Wayne Kable is the person of that name who was convicted in New South Wales on 1 August 1990 of the manslaughter of his wife, Hilary Kable.

The appellant argued that s 5(1) amounted to a legislative usurpation of judicial power. However, as this argument was predicated upon a constitutional separation of powers

⁸ *Kable v DPP* (NSW) (1996) 189 CLR 51.

that did not exist in NSW⁹ – a point made clear by the NSW Supreme Court in *Building Construction Employees' and Builders' Labourers' Federation of NSW v Minister for Industrial Relations*¹⁰ – no such argument could be maintained. In any event, as Gummow J explained, the case was not ‘one of incarceration by legislative or executive fiat’.¹¹ Instead, by a majority of four to two (Brennan CJ and Dawson J dissenting),¹² the High Court held that the function purportedly vested in the Supreme Court by the *Community Protection Act* was incompatible with its exercise of Chapter III judicial power.¹³ In other words, the majority drew upon the incompatibility doctrine – rejected in the *Boilermakers* Case and rejuvenated under the auspices of the *persona designata* exception¹⁴ – as a means of controlling the functions that may be vested in State courts. Elizabeth Handsley has argued that this approach

represents the worst of both worlds by placing severe limitations on State courts without any corresponding limitations on State parliaments (except to the extent they may wish to confer powers on the courts in question). The result is that the States have judiciaries which are half-independent, and that half is the less important half.¹⁵

In the event, and as demonstrated below, the limitations imposed on State courts have not proven to be ‘severe’. What, then, was the High Court’s rationale in adopting this approach? It has already been suggested that one explanation for the *Kable* doctrine is

⁹ *Kable v DPP* (NSW) (1996) 189 CLR 51, 65 (Brennan CJ), 77-80 (Dawson J), 92 – 94 (Toohey J), 109 (McHugh J).

¹⁰ (1986) 7 NSWLR 372. See also Anne Twomey, *The Constitution of New South Wales* (2004), 758-59.

¹¹ *Ibid* 131 (Gummow J).

¹² Brennan CJ and Dawson J applied the traditional approach that the Commonwealth Parliament must take State court as it finds them. *Ibid* 67 (Brennan CJ), 83 (Dawson J).

¹³ *Ibid* 89-99 (Toohey J), 99-108 (Gaudron J), 108-24 (McHugh J), 124-45 (Gummow J).

¹⁴ See above Chapter 2 nn 112-21, Chapter 5 nn 11-73, and accompanying text.

¹⁵ Elizabeth Handsley ‘Do Hard Laws Make Bad Cases? The High Court’s Decision in *Kable v Director of Public Prosecutions* (NSW)’ (1997) 25 *Federal Law Review* 171, 171.

the need to maintain the inherent and appellate jurisdictions of the High Court. In order to demonstrate this proposition, however, it is necessary to start by examining in more detail the reasoning adopted by the majority in that case.

An integrated Australian judiciary

Fundamental to the majority's finding in *Kable* was the notion of an integrated Australian judicial system. In Gaudron J's view:

Neither the recognition in Ch III that State courts are the creatures of the States nor its consequence that, in the respects indicated, the Commonwealth must take State courts as it finds them detracts from what is, to my mind, one of the clearest features of our Constitution, namely, that it provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth ... That follows from covering cl 5, which provides that the Constitution is "binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State", and from s 106, by which the Constitution of each State is made subject to the Australian Constitution.¹⁶

Her Honour went on to outline two 'matters of significance'¹⁷ which led to the conclusion that State parliaments could not vest functions in State courts 'repugnant to or incompatible with' the exercise of federal judicial power.¹⁸ The first matter related to the quality of federal justice. Her Honour found, 'nothing anywhere in the Constitution to suggest that it permits of different grades or qualities of justice,

¹⁶ *Kable v DPP* (NSW) (1996) 189 CLR 51, 102.

¹⁷ *Ibid* 103.

¹⁸ *Ibid*.

depending on whether judicial power is exercised by State courts or federal courts created by Parliament'.¹⁹ The second matter (previously noted by Her Honour in *Leeth*) related to the 'role and status' of State courts as recipients of federal jurisdiction.²⁰ Gaudron J found s 3 of the *Act* to be 'the antithesis of the judicial process'.²¹ As such, it compromised:

The integrity of the Supreme Court of New South Wales and, because that court is not simply a State court but a court which also exists to exercise the judicial power of the Commonwealth, it also has the effect of compromising the integrity of the judicial system brought into existence by Ch III of the Constitution.²²

McHugh J adopted similar language and reasoning, explaining that covering clause 5 and Ch III envisaged an integrated judicial system with the High Court at 'the apex:'

Under the Constitution ... the State courts have a status and a role that extends beyond their status and role as part of the State judicial systems. They are part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power. Moreover, the Constitution contemplates no distinction between the status of State courts invested with federal jurisdiction and those created as federal courts. There are not two grades of federal judicial power. Thus, neither the Parliament of New South Wales nor the Parliament of the Commonwealth

¹⁹ *Kable v DPP* (NSW) (1996) 189 CLR 51, 103.

²⁰ Her Honour made reference to her earlier statement in *Re Nolan* (1991) 172 CLR 460, 496, that Ch III implies a fair hearing. See Chapter 4.

²¹ *Kable v DPP* (NSW) (1996) 189 CLR 51, 106.

²² *Ibid* 107.

can invest functions in the Supreme Court of New South Wales that are incompatible with the exercise of federal judicial power.²³

Gummow J similarly found that, ‘the Constitution itself is rendered, by covering clause 5, binding on the courts, judges and people of every State’.²⁴ As such:

The judicial power is not to be confessed and avoided by an attempt at segregation of the courts of the States into a distinct and self-contained stratum within the Australian judicature. Rather, there is an integrated Australian legal system, with, at its apex, the exercise by this Court of the judicial power of the Commonwealth.²⁵

Unlike Gaudron, McHugh and Gummow JJ, Toohey J confined his analysis to the exercise by State courts of functions incompatible with the exercise of federal judicial power.²⁶ As such, His Honour did not find it necessary to extend constitutional principles on the basis of an integrated judicial system that takes account of the ‘role and status’ of State Courts,²⁷ and saw no basis for a new doctrine that extended the reach of Ch III beyond State courts exercising federal jurisdiction.²⁸

Gaudron, McHugh and Gummow JJ’s recognition of an ‘integrated’ judicial system (and the need to maintain the ‘institutional integrity’ of the Australian judiciary) establishes a conduit for the transfer of certain Ch III limitations from the federal

²³ *Kable v DPP* (NSW) (1996) 189 CLR 51, 114 – 115.

²⁴ *Ibid* 143

²⁵ *Ibid*.

²⁶ *Ibid* 94.

²⁷ Peter Johnston and Rohan Hardcastle, ‘State Courts: The Limits of *Kable*’ (1998) 20 *Sydney Law Review* 216, 218.

²⁸ *Kable v DPP* (NSW) (1996) 189 CLR 51, 94.

realm to the State realm.²⁹ This conduit potentially limits the functions that may be vested in certain State courts, to be determined by a test of ‘incompatibility’. There will also be a certain amount of ‘backwash’ from the *Kable* doctrine to the ‘judicial process’ implication discussed in Chapter 4.³⁰ Ch III courts must be limited by the procedural implications drawn in a purely State/territory context because, were it otherwise, the (weaker) incompatibility doctrine could impose greater demands on State/territory courts than the (stricter) separation doctrine imposes on Ch III courts. This is a theoretical impossibility.³¹ It does not follow, however, that the limitations placed on Ch III courts will necessarily apply to State courts (although it may be a useful indicator).³² More importantly, a function which does not offend against judicial power in a Ch III court could never offend against *Kable*.³³

Even in its discrete doctrinal context, however, the scope of *Kable* was, and still is, uncertain in at least two important respects. First of all, the majority provided limited guidance as to which courts the doctrine was intended to apply to (the ‘integration component’). Second of all, no clear vision emerged from the majority judgments as to the functions (other than detention without adjudgment of criminal guilt) which

²⁹ Fiona Wheeler, ‘Due Process, Judicial Power and Chapter III in the new High Court’ (2004) 32 Federal Law Review 205, 217.

³⁰ Fiona Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’ (1997) 23(2) *Monash University Law Review* 248, 259.

³¹ It is worth emphasising the fact, of course, that the principles identified in respect of State courts exercising federal jurisdiction will be ‘equally applicable to the issue whether a law has unconstitutionally attempted to interfere with the judicial process of the federal courts’. Leslie Zines, *The High Court and the Constitution* (5th Ed 2008), 278.

³² *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 614 (86) (Gummow J), 630 [144] (Kirby J). *Baker v The Queen* (2004) 223 CLR 513, 534 [50] (McHugh, Gummow, Hayne and Heydon JJ).

³³ *HA Bachrach Pty Ltd v The State of Queensland* (1998) 195 CLR 547, 561-62 [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

might in fact be incompatible with the exercise of federal judicial power (the ‘incompatibility component’).³⁴

The following two sections explore the integration and incompatibility components of *Kable* in detail, in order to determine what (if any) limits the doctrine might place upon the capacity of State (and territory) courts to engage in judicial mediation. The first section begins by examining in closer detail the judgments of the majority in *Kable* itself, and then goes on to analyse various judgments which cast further light upon the scope of the doctrine. This analysis demonstrates that the High Court has interpreted the integration component of *Kable* expansively, but that this expansion must be viewed in the context of a broader ‘integration principle’. It is argued that this broader principle (the seeds of which were sown long before the judgment in *Kable* was delivered) is rooted in the need to preserve the High Court’s appellate jurisdiction. The second section demonstrates that while the *Kable* doctrine has (in effect) become jurisdictionally ubiquitous, the High Court has so narrowed the circumstances in which incompatibility will arise as to all but ‘define the *Kable* doctrine out of existence’.³⁵ It is submitted, on this basis, that *Kable* does not, and never did, reflect a desire on the part of the High Court to engage in any detailed judicial management of State and territory legal systems; merely the capacity to protect the inherent jurisdiction of any Australian court.

³⁴ See Patrick Keyzer, ‘Preserving Due Process of Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?’ (2008) 30 *Sydney Law Review* 101, 102.

³⁵ *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532, 578 [106] (Kirby J).

Which Courts does Kable apply to?

The first issue to be addressed is which courts the *Kable* doctrine applies to. Is the doctrine confined to supreme courts, or does it also apply to other State courts? Assuming the latter, does the doctrine apply only to State courts when *exercising* federal judicial power, or always in the case of State courts *invested* with federal judicial power? What about State courts which are merely *capable* of being invested with federal judicial power? And, does *Kable* also apply to territory courts? The answers to these questions are critical to this thesis, as they will determine the extent to which the *Kable* doctrine has the capacity to limit the development of judicial mediation in the States and territories.

A convenient starting point in this inquiry is Toohey, Gaudron, McHugh and Gummow JJ's agreement in *Kable* that the Constitution ensures an avenue of appeal from State supreme courts to the High Court.³⁶ As McHugh J explained, 's 73 of the Constitution implies the continued existence of the supreme courts by giving a right of appeal from the Supreme Court of each State to the High Court'.³⁷ By parity of reasoning, McHugh J explained, s 73 also prevents State legislatures from stripping all non-federal jurisdictions from State supreme courts (so as to effectively remove that right of appeal).³⁸ While the majority judges agreed that the doctrine would apply to supreme courts when exercising federal jurisdiction, however, they differed as to how far they would see the doctrine extend into State court systems.

³⁶ *Kable v DPP* (NSW) (1996) 189 CLR 51, 95 (Toohey J), 101 (Gaudron J), 111 (McHugh J), 141-42 (Gummow J).

³⁷ *Ibid* 103 (Gaudron J), 111 (McHugh J), 139 (Gummow J).

³⁸ *Ibid* 111 (McHugh J). McHugh J did not see this reasoning as extending to all State Courts. However in His Honour's view, leaving 'aside the special position of the supreme courts of the States, the States can abolish or amend the structure of existing courts and create new ones. However, the Constitution requires a judicial system in and a Supreme Court for each State and, if there is a system of State courts in addition to the Supreme Court, the Supreme Court must be at the apex of the system'.

Toohy J focussed exclusively on supreme courts, although he did not exclude the possibility that the doctrine might extend to other State courts exercising federal jurisdiction. By avoiding the ‘integrated’ approach adopted by Gaudron, McHugh and Gummow JJ,³⁹ however, His Honour appeared to limit the application of the *Kable* doctrine to State courts when exercising federal judicial power.⁴⁰ On this view, even supreme courts could exercise functions incompatible with federal judicial power – provided that they do not exercise federal jurisdiction in the same matter.⁴¹

In contrast, and consistent with their vision of an integrated Australian judicial system, Gaudron and McHugh JJ agreed that the *Kable* doctrine would apply to all State courts vested with federal judicial power, whether exercising that power or not. According to Gaudron J, ‘Chapter III requires that the parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth’.⁴² Likewise, according to McHugh J:

It is a necessary implication of the Constitution’s plan of an Australian judicial system with State courts *invested* with federal jurisdiction that no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts.⁴³

³⁹ See above nn 16-25 and accompanying text.

⁴⁰ Gummow J explained that if ‘the Act operated on a category of persons and a defence to an application for a preventive detention order was confined to a challenge that the criteria in s5(1) had not been met, different questions might arise. In that situation the judicial power of the Commonwealth might not be involved; that is something on which it is unnecessary to comment’. *Kable v DPP (NSW)* (1996) 189 CLR 51, 99.

⁴¹ This approach was criticised by Dawson J for leading to ‘artificial’ results. *Ibid* 87.

⁴² *Ibid* 103.

⁴³ *Ibid* 118 (*emphasis added*).

Gummow J agreed with Gaudron and McHugh JJ that the *Kable* doctrine was not restricted to State courts exercising federal jurisdiction, but reached this conclusion on the basis that all, ‘decisions of the State courts, whether or not given in the exercise of invested jurisdiction, yield “matters” which found appeals to this Court under s73(ii)’.⁴⁴ While this approach leads to substantially the same outcome as the approach adopted by Gaudron and McHugh JJ, it would not (as Gummow J noted) limit State courts on the rare occasion that no right of appeal existed.⁴⁵ Gaudron and McHugh JJ’s approach has since won favour with the High Court,⁴⁶ but it is essential to acknowledge that both approaches reflect the need to ensure the effectiveness of the High Court’s appellate jurisdiction.

Gaudron, McHugh and Gummow JJ did not clarify whether Australia’s integrated judiciary (and thus the scope of *Kable*) included the courts of the territories. A literal approach to the doctrine suggests that it should, because ‘public confidence’ is presumably blind to a citizen’s place of residence.⁴⁷ At the time that *Kable* was decided, however, a significant ‘problem of interpretation [which had] vexed judges since the earliest days of federation’⁴⁸ stood in the way of this conclusion. This problem has now been substantially removed by the High Court’s decision in

⁴⁴ *Kable v DPP* (NSW) (1996) 189 CLR 51, 142.

⁴⁵ *Ibid* 142-43. See also Johnston and Hardcastle, above n 27, 226.

⁴⁶ *R v Moffatt* (1997) 91 A Crim R 557, 577 (Hayne JA); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 171 [61] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

⁴⁷ Historically, differential treatment has nevertheless been afforded to the citizens of certain territories. See Peter Hanks, Patrick Keyzer and Jennifer Clarke, *Australian Constitutional Law: Materials and Commentary* (7th ed 2004), [12.3.5]. These differences are the subject of this section. See also Gerard Carney, *The Constitutional Systems of the Australian States and territories* (2006), 2.

⁴⁸ *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 331 (Gleeson CJ, McHugh and Callinan JJ). For similar earlier pronouncements, see: *Re Wakim Ex parte McNally* (1999) 198 CLR 511, 594 (Gummow and Hayne JJ); *Spratt v Hermes* (1965) 114 CLR 226, 274 (Windeyer J).

NAALAS v Bradley, discussed below.⁴⁹ An examination of the issues involved remains pertinent to the current analysis, however, as it illustrates the changing relationship between the territories and the Commonwealth, and demonstrates why *Kable* must apply to *all* Australian courts capable of exercising judicial power, whether actually vested with that power or not. This examination also contextualises the broader jurisprudential foundation upon which the integration component of *Kable* rests, which in turn provides one possible explanation for the High Court's reluctance to expand the incompatibility component of the doctrine. Understood in these terms, it is highly unlikely that judicial mediation will be considered incompatible with the exercise of federal judicial power.

The 'integration' principle

The chief obstacle to the extension of *Kable* to territory courts is that the doctrine applies to 'such other courts as [Parliament] invests with federal jurisdiction' under s 71 (Ch III),⁵⁰ whereas territory courts are vested with federal judicial power under s 122 (the 'territories power'), which is contained in Ch VI of the Constitution. For this reason, the territories have traditionally been considered outside the scope of Ch III and the separation of powers established by Ch's I, II and III.⁵¹ This 'early doctrine'⁵² was expressed by Griffith CJ in *R v Bernasconi* ('*Bernasconi*');

⁴⁹ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

⁵⁰ *HA Bachrach Pty Ltd v The State of Queensland* (1998) 195 CLR 547, 561-562 [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

⁵¹ *Buchanan v Commonwealth* (1913) 16 CLR 315. See also Stephen McDonald, 'Territory Courts and Federal Jurisdiction' (2005) 33 *Federal Law Review* 57, 90; Tom Pauling and Sonia Brownhill, 'The territories and Constitutional Change' (2007) 28 *Adelaide Law Review* 55, 59.

⁵² McDonald, above n 51, 61.

In my judgment, Chapter III is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to territories. Sec. 80, therefore, relates only to offences created by the Parliament by Statutes passed in the execution of those functions, which are aptly described as ‘laws of the Commonwealth’. The same term is used in that sense in sec. 5 of the *Constitution Act* itself, and in secs. 41, 61 and 109 of the Constitution.⁵³

Thus, the territories (and their courts) were not considered part of the ‘federal compact’,⁵⁴ but rather ‘creatures of the Commonwealth’;⁵⁵ constituted and governed solely within the jurisdictional bubble of s 122. Territory courts could not be vested with federal judicial power, and none of the restrictions placed upon that power extended to the territories.⁵⁶ Earlier it was explained that Gaudron, McHugh and Gummow JJ identified covering clause 5 of the *Commonwealth of Australia Constitution Act 1900* (UK) as the foundation for their theory of an integrated Australian judiciary in *Kable*. If the view expressed by Griffith CJ in *Bernasconi* was (or is still) correct, this would necessarily exclude territory courts from the scope of the *Kable* doctrine, because the ‘laws of the Commonwealth’ referred to in covering clause 5 would not include legislation governing territory courts passed under s 122.⁵⁷

⁵³ (1915) 19 CLR 629, 635 (Griffith CJ); 640 (Gavan Duffy and Rich JJ). See also *Mitchell v Barker* (1918) 24 CLR 365; *Frost v Stevenson* (1937) 58 CLR 528.

⁵⁴ Patrick Keyzer, ‘The “Federal Compact”, The territories and Chapter III of the Constitution’ (2001) 75 *Australian Law Journal* 124.

⁵⁵ Carney, *The Constitutional Systems of the Australian States and territories*, above n 47, 1.

⁵⁶ *Ibid.*

⁵⁷ Chief Justice Griffith’s view has now been formally overruled by *Wurridjal v Commonwealth* (2009) 237 CLR 309. See below nn 109-15.

Because the appellate jurisdiction of the High Court is contained in s 73(ii), the proposition that Ch III had no application whatsoever to territory courts was always a threat to the High Court's place at the apex of an integrated Australian judiciary. However, the High Court's initial response to this threat was characteristically legalistic and confined. In *Porter v The King; Ex Parte Yee*,⁵⁸ it was argued for the Crown (by Owen Dixon KC, as he then was) that, following *Re Judiciary and Navigation Act* (which restricted the 'matters' that could be determined by federal courts to those provided in s 75 of the Constitution)⁵⁹ no right of appeal from the territories could be vested in the High Court.⁶⁰ By a majority of four to two the High Court rejected this argument and allowed the appeal, but for inconsistent reasons. Isaacs and Rich JJ considered that *Re Judiciary and Navigation Act* applied only to 'the Commonwealth proper', that is to say, 'the judicial power of the Commonwealth consisting of the States'.⁶¹ Higgins J distinguished *Re Judiciary and Navigation Act* on the basis that it applied only to the original jurisdiction of the High Court and did not prevent the grant of appellate jurisdiction under s 122,⁶² and Starke J believed that *Re Judiciary and Navigation Act* applied only to judicial power as conferred by Ch III.⁶³ The approach of Isaacs and Rich JJ was later endorsed by the Privy Council in the *Boilermakers' Case*, in whose view the 'legislative power in respect of the

⁵⁸ (1926) 37 CLR 432.

⁵⁹ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257. See above Chapter 2 nn 122-26 and accompanying text.

⁶⁰ *Porter v The King; Ex Parte Yee* (1926) 37 CLR 432 (Isaacs, Higgins, Rich and Starke JJ; Knox CJ and Gavan Duffy J dissenting).

⁶¹ Ibid 448 (Rich J), 441 (Isaacs J).

⁶² Ibid 447. This conclusion is dubious. As Stephen McDonald has pointed out: 'If ... the High Court may hear appeals outside s 73 of the Constitution, there would seem to be no reason why the Parliament could not provide for an appeal to the High Court from a judicial determination that did not constitute a "matter". Appeals under s 73 are limited to appeals from "judgments, decrees, orders, and sentences", but if the Parliament may create appeals outside s 73, it could provide that the Court should hear appeals from an advisory opinion'. Above n 51, 69.

⁶³ *Porter v The King; Ex Parte Yee* (1926) 37 CLR 432, 449.

territories is a disparate, non-federal matter’.⁶⁴ As such, the Privy Council found ‘no reason why the Parliament having plenary power under s 122 should not invest the High Court or any other court with appellate jurisdiction from the courts of territories’.⁶⁵

In *Spratt v Hermes* (*‘Spratt’*), Barwick CJ ‘took the opportunity ... to explode the early doctrine,’⁶⁶ finding that *Bernasconi* was authority only for the proposition that s 80 had no application to the territories⁶⁷ (principally for the reason that jury trials would be logistically infeasible in certain territories)⁶⁸ and not necessarily the remainder of Ch III:

There does not seem to me to be any single theme running throughout Chap. III which requires it to be treated so much all of one piece that if any part of it relates only to federal matters, every part of it must likewise be restrained. Thus, the mere presence of s. 80 in Chap. III does not, in my respectful opinion, require that it [the remainder of Ch III] be inapplicable to territories and therefore to non-federal offences ... [Indeed] parts of Chap. III [including ss 74, 75, 76] are clearly “applicable to the territories”⁶⁹

⁶⁴ *Porter v The King; Ex Parte Yee* (1926) 37 CLR 432, 449.

⁶⁵ *Attorney-General (Commonwealth) v The Queen* (1957) 95 CLR 529, 545. McHugh J later described these views as ‘constitutional heresies’: *Gould v Brown* (1998) 193 CLR 346, 427 (McHugh J).

⁶⁶ McDonald, above n 51, 61.

⁶⁷ *Spratt v Hermes* (1965) 114 CLR 226, 242.

⁶⁸ Ibid 244. Barwick CJ observed, that ‘the disclosed intention of the Constitution [that s80 requiring trial by jury, ergo Ch III, does not apply to the territories] might be derived from the unlikelihood that it could have been thought that juries would be found in such potential territories of the Commonwealth as might have been within contemplation at the foundation of the Commonwealth’.

⁶⁹ Ibid 245. See also Windeyer J, at 273.

The Full Court held that s 72 had no application to the ACT Court of Petty Sessions. Keen to recognise the ‘essential unity and singleness of the Commonwealth,’⁷⁰ however, whilst remaining broadly faithful to the traditional disparate approach,⁷¹ Barwick CJ drew a distinction between ‘federal’ powers (which applied only within the ‘federal compact’)⁷² and ‘non-federal’ powers (‘not shared any wise with the States’).⁷³ The supposed benefit of this rather confusing dichotomy was to allow certain parts of Ch III to be applied to the territories (because they were created by, but were not exclusive to, the relationship between the States and the Commonwealth).

It is crucial to appreciate that Barwick CJ did not deny the existence of separate and distinct category of ‘territorial’ jurisdiction. Indeed, in His Honour’s view, territorial courts were still to be considered non-federal in nature, and could not be vested with federal judicial power.⁷⁴ The trick to Barwick CJ’s approach was not to redefine the nature of s 122, but rather the nature of Ch III and its *effect upon* s 122. To return to the metaphor adopted above, the jurisdictional bubble of s 122 remained intact, but the nature of the ‘federal compact’ was reconceptualised so that certain aspects of Ch III could permeate that bubble. This approach was unanimously endorsed in *Capital TV and Appliances Pty Ltd v Falconer*,⁷⁵ and the conclusion that s 72 does not extend to territory courts was affirmed in *Re Governor, Goulburn Correctional Centre; Ex*

⁷⁰ *Spratt v Hermes* (1965) 114 CLR 226, 247.

⁷¹ McDonald, above n 51, 61. Barwick CJ adopted the same reasoning in *Teori Tau v Commonwealth*, and later in *Capital TV & Appliances v Falconer* (1971) 125 CLR, 600, finding that the Supreme Court of the ACT was ‘neither a federal court within the meaning of s. 71 or s. 73 of the Constitution as interpreted by the decisions of this Court nor a Court invested with “federal” jurisdiction’.

⁷² Stephen McDonald observes that the word ‘federal’ has ‘several different usages’, and that Barwick CJ’s reference was to the ‘dual system of government, central and provincial’, generated by Chapters I, II and III. McDonald, above n 51, 62.

⁷³ *Spratt v Hermes* (1965) 114 CLR 226, 242.

⁷⁴ *Ibid* 242-43.

⁷⁵ (1971) 125 CLR 591.

parte Eastman ('*Eastman*').⁷⁶ Despite subsequent criticism (discussed below), *Spratt* was an important step in the recognition of an integrated Australian judicial system, and for this reason the line of authority following it is referred to here as the '*Spratt* stream'.

The disparate approach (and Barwick CJ's federal/non-federal dichotomy in particular) has been heavily criticised, both in theory and in practice. The notion that a 'federal compact' can generate a jurisdiction that is 'non-federal' is, to say the least, counter-intuitive. Moreover, as Patrick Keyzer has pointed out, 'it simply is not true to say that the Commonwealth's power over the territories is not shared with the States ... The true position is that the States share power over the territories through their representation in the Senate'.⁷⁷ It is submitted that Leslie Zines was correct, however, when he concluded that:

The biggest problem that arises as a result of the decision in *Spratt v Hermes* is not the desirability or otherwise of the decision but the impossibility of predicting future decisions of the High Court in relation to s 122 because of the wide diversity of opinion by members of the Court on fundamental principles.⁷⁸

In addressing this problem, it is instructive to consider the changing status of the territories (and territory courts) in the years since Professor Zines made this

⁷⁶ (1999) 200 CLR 322 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁷⁷ Keyzer, 'The Federal Compact', above n 56, 129-30.

⁷⁸ Leslie Zines, 'Laws for the Government of any Territory' Section 122 of the Constitution' (1966) 2 *Federal Law Review* 72, 94.

observation.⁷⁹ The disparate approach to the relationship between s 122 and Ch III (as modified by *Spratt et al*), reflects the view, expressed by Isaacs J in *Bernasconi*, that in the early days of federation the fledgling territories were, ‘not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers’.⁸⁰ By current standards, certain of Isaacs J’s remarks in *Bernasconi* are, at best, paternalistic.⁸¹ Nevertheless, as long as the territories remained ‘dependent upon’, and under the ‘tutelage’ of, the Commonwealth Parliament, the conclusion that they remained outside the federation was a pragmatic one. Territory courts were not required to satisfy the strict standards of tenure and procedure required of courts exercising federal jurisdiction;⁸² territory laws were created by the Commonwealth Parliament; and the High Court exercised appellate control over territory courts by virtue of a jurisdiction granted under 122 (albeit at the direction of the Commonwealth Parliament, as opposed to the Constitution itself).⁸³

Under a federal system comprising self-governing territories, however, the disparate approach became less tenable. Self-government was granted to the Northern Territory in 1978,⁸⁴ Norfolk Island in 1979,⁸⁵ and the ACT in 1988.⁸⁶ Upon the grant of self-

⁷⁹ This is the central thesis of Tom Pauling and Sonia Brownhill’s article, ‘The territories and Constitutional Change’, above n 51.

⁸⁰ *R v Bernasconi* (1915) 19 CLR 629, 637 – 638. Tom Pauling and Sonia Browning argue that the; “disparate view”, that territories are outside Chapter III and the federation, which consists of the Commonwealth and the States, was founded, we suggest, on the then characteristics of territories highlighted by Isaacs J in *Bernasconi*. Pauling and Browning, above n 51, 59.

⁸¹ His Honour appeared to be of the view that Germans and Polynesians had no need of jury trials, on the basis that ‘Parliament’s sense of justice and fair dealing is sufficient to protect them’. *R v Bernasconi* (1915) 19 CLR 629, 638. See generally the discussion in Hanks, Keyzer and Clarke, above n 47, [12.5.5].

⁸² In addition to acknowledging that s 80 does not apply to Territory courts, *Spratt v Hermes* (1965) 114 CLR 226 determined that s 72 of the Constitution had no application to Territory courts.

⁸³ *Capital TV & Appliances v Falconer* (1971) 125 CLR 591.

⁸⁴ *Northern Territory (Self-Government) Act 1978* (Cth).

⁸⁵ *Norfolk Island Act 1979* (Cth)

⁸⁶ *Australian Capital Territory (Self-Government) Act 1988* (Cth).

government the supreme courts of these territories were either re-constituted by,⁸⁷ or transferred under the jurisdiction of,⁸⁸ the territories themselves. Thus, the possibility arose that the self-governing territories could effectively remove any right of appeal to the High Court by stripping all non-federal jurisdictions from territory courts. The jurisdictional bubble created by s 122 was no longer firmly tethered to the Commonwealth, and could (in theory) be detached at the discretion of the self-governing territories. The fact that a right of appeal *may* be granted under s 122 is a far cry from the assurance of a general right of appeal from territory courts under s 73(ii).⁸⁹ The danger posed by this incongruity to Australia's constitutional integrity is patent:

If the avenue of appeal from territory courts to the High Court could be blocked, an 'evident purpose' of the *Constitution*, to create an integrated national system of law, would be defeated; a rogue territory court could develop the common law in a manner which was inconsistent with the common law of Australia laid down by the High Court, leaving it powerless to correct any error. More unthinkable still, if appeals to the High Court were not constitutionally entrenched in matters involving the interpretation of the Commonwealth *Constitution*, it could receive non-uniform interpretation in some territories. This would undermine the Court's role as the 'guardian of the *Constitution*' at the apex of a judiciary 'functionally charged with upholding the rule of law'.⁹⁰

⁸⁷ *Supreme Court Act 1979* (NT).

⁸⁸ *Norfolk Island Act 1979* (Cth), s59; *ACT Supreme Court (Transfer) Act 1992* (Cth).

⁸⁹ This was the finding of the High Court in *Capital TV & Appliances v Falconer* (1971) 125 CLR 591. At the time, the Supreme Court of the ACT was conferred jurisdiction by the *Australian Capital Territory Supreme Court Act 1933 – 1968* (Cth), passed by the Commonwealth Parliament under s 122.

⁹⁰ McDonald, above n 51, 70.

Were no right of appeal to the High Court to be guaranteed from the territories this would also, of course, undermine the notion that the *Kable* doctrine applies to territory courts because, as noted above, the starting point for the reasoning adopted by the majority in *Kable* was that a right of appeal from the State supreme courts to the High Court is guaranteed by s 73 (ii). If no right of appeal were guaranteed from the supreme courts of the territories established by self-governing territories, it would be difficult to contend that those courts formed part of Australia's integrated judicial system.

However, an alternative approach (fostered principally by Sir Owen Dixon)⁹¹ had begun to 'break down the doctrine' established in *Bernasconi*, and to reinterpret s 122 as an integrated part of the Constitution, long before the High Court's decision in *Kable*.⁹² In *Australian National Airways Pty Ltd v Commonwealth*,⁹³ Dixon J (as he then was) saw no difficulty in 'interpreting the Constitution as a whole,'⁹⁴ and added that, 'I have always found it hard to see why s. 122 should be disjoined from the rest of the Constitution, and I do not think that [*Bernasconi*] really meant such a distinction'.⁹⁵ Subsequently, in *Lamshed v Lake*, His Honour rejected the argument that a 'law of the Constitution' as referred to in s 109 of the Constitution excludes laws created under s 122.⁹⁶ In effect, Dixon CJ

⁹¹ In addition to the cases cited below, see: Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation', (1957) 31 *Australian Law Journal* 240. Sir Owen was not, of course, the first to advocate an approach to constitutional interpretation that focussed on the Constitution as a whole. See, for example, the view of Williams J in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 307, that, 'the Constitution like any other written instrument must be construed as a whole'.

⁹² McDonald, above n 51, 59.

⁹³ (1945) 71 CLR 29

⁹⁴ *Ibid* 84.

⁹⁵ *Ibid*.

⁹⁶ *Lamshed v Lake* (1958) 99 CLR 132. Dixon CJ made similar observations in *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 370-72.

upheld the power of the Parliament, in reliance upon s 122 of the Constitution, to legislate with effect outside the geographical limits of a territory and within the area of the whole of the Commonwealth ... [This reasoning] politely but forcefully discountenanced the then recent assertion by the Privy Council in *Attorney-General of the Commonwealth of Australia v The Queen* that: “the legislative power in respect of the territories is a disparate, non-federal matter.”⁹⁷

Dixon CJ was not alone in his preference for an integrative approach to constitutional interpretation. In *Spratt*, for example, Windeyer J expressed the view (while still affirming the ‘workable anomaly’ created by s 122), that the ‘special position and function of this Court under the Constitution require that it should be able to declare the law for all courts that are within the governance of Australia’.⁹⁸ In the same case, Menzies J had noted (with reference to Barwick CJ’s judgment) that:

To me, it seems inescapable that territories of the Commonwealth are parts of the Commonwealth of Australia and I find myself unable to grasp how what is part of the Commonwealth is not part of the ‘the Federal System’; see the *Commonwealth of Australia Constitution Act*, s 5, which refers not only to every State but to ‘every part of the Commonwealth’.⁹⁹

The ‘integrated’ approach to the interpretation of s 122 has gained increasing momentum in recent years, principally as a means of securing the High Court at the apex of Australia’s judicial system through the extension of Ch III (the ‘*Spratt*

⁹⁷ *Wurridjal v Commonwealth* (2009) 237 CLR 309, 383 [175] (Gummow and Hayne JJ).

⁹⁸ (1965) 114 CLR 226, 277.

⁹⁹ *Spratt v Hermes* (1965) 114 CLR 226, 270.

stream'),¹⁰⁰ but also as a means of limiting Parliament's legislative power under Ch I. The growth of this aspect of the integration principle is illustrated by the High Court's changing attitude to the question whether laws made under s 122 must comply with the requirement of s 51 (xxxi) (that property be acquired on 'just terms').

In *Teori Tau v Commonwealth (Teori Tau)*,¹⁰¹ the Full Bench of the High Court unanimously held that 'the power to make laws providing for the acquisition of property in the territory of the Commonwealth is not limited to the making of laws which provide just terms of acquisition'.¹⁰² This conclusion, which was 'totally at odds with that of Dixon CJ and Kitto J in *Lamshed v Lake*,'¹⁰³ was a powerful endorsement of the disparate approach favoured in *Bernasconi*, and permitted Parliament a plenary power in the exercise of s 122 that was entirely unencumbered by the legislative limits enshrined in Ch I.

In *Newcrest Mining (WA) Ltd v Commonwealth*, three High Court judges (Gaudron, Gummow and Kirby JJ) rejected the view of the Full Bench in *Teori Tau*, and held that certain proclamations made by the Governor-General under s 7 of the *Conservation Act 1975* (Cth) were at odds with the requirement of s 51 (xxxi) that

¹⁰⁰ This development corresponds with the onset of self-government in the territories. Hanks, Keyzer, and Clarke explain that the 'full integrationist approach to s 122 is probably best exemplified by Justice Gummow's judgment in *Newcrest Mining v Commonwealth* (1997) 190 CLR 513. This case was decided after the ACT, the NT and Norfolk Island had been granted territorial self-government'. Above n 47, 1084-85. Likewise, Tom Pauling and Sonia Brownhill have stated that, as 'the three self-governing territories (particularly the Northern Territory and the Australian Capital Territory) ... approached self-government, and then achieved it, the High Court incrementally moved away from the 'disparate view' to where it has now, practically, accepted the view that these territories have achieved an integration into the federation comparable in many respects to that of the States'. Above n 51, 60. This has since been confirmed in *Wurridjal v Commonwealth* (2009) 237 CLR 309, discussed below.

¹⁰¹ (1969) 119 CLR 564 (Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Walsh and Owen JJ).

¹⁰² *Teori Tau v Commonwealth* (1969) 119 CLR 564, 570

¹⁰³ Leslie Zines, 'The Nature of the Commonwealth' (1998) 20 *Adelaide Law Review* 83, 83.

property be acquired ‘on just terms’.¹⁰⁴ Toohey J agreed that the proclamations violated the requirements of s 51 (xxxi), but based this conclusion on the finding that the *Act* was created under s 51 *and* s 122 (and was therefore a ‘law of the Commonwealth’ by virtue of the former).¹⁰⁵ Gummow J (with whom Gaudron and Kirby JJ broadly agreed)¹⁰⁶ went further. In His Honour’s view, it could ‘hardly be suggested that s 122 operates other than subject to the Constitution and, in particular, that it is not to be read with the Constitution as a whole’.¹⁰⁷ In His Honour’s opinion, s 122 ‘is not to be torn from the Constitutional fabric’.¹⁰⁸ As Gummow, Gaudron and Kirby JJ were not in the majority on this issue, *Teori Tau* remained authority for the general proposition that s 51(xxxi) had no application to s 122. *Newcrest* was nevertheless a significant milestone in the development of the integration principle, and has since won majority approval in *Wurridjal v Commonwealth* (‘*Wurridjal*’).¹⁰⁹

In *Wurridjal*, a bare majority the High Court (French CJ, Gummow, Kirby and Hayne JJ) overturned *Teori Tau*,¹¹⁰ and ruled that the acquisition of property in the territories (under s 122) must be ‘on just terms’. For various reasons, Heydon, Crennan and Kiefel JJ found it unnecessary to address the constitutional issue regarding the relationship between s 122 and s 51 (xxxi),¹¹¹ but none of the minority judges appeared to prefer the disparate approach. In French CJ’s opinion:

¹⁰⁴ (1997) 190 CLR 513 (Brennan CJ, Dawson and McHugh JJ in dissent).

¹⁰⁵ *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 561. Gaudron J also expressed the view, at 568, that, it is ‘one thing to read down s51(xxxi) so that it does not apply to a law enacted pursuant to s122 of the Constitution. It is another to treat it as not applying to a law which has two purposes, one of which falls within the terms of s51(xxxi)’.

¹⁰⁶ *Ibid* 568 (Gaudron J), 662 (Kirby J).

¹⁰⁷ *Ibid* 606 (Toohey J).

¹⁰⁸ *Ibid* 598.

¹⁰⁹ (2009) 237 CLR 309.

¹¹⁰ *Ibid* 359 [86] (French CJ), 388 [189] (Gummow and Hayne J), 419 [287] (Kirby J).

¹¹¹ *Ibid* 427 [318] Heydon J, 437 [355] Crennan J, 469 [460] Kiefel J.

An integrated approach to the availability of legislative powers and limits on them throughout the Commonwealth is to be preferred where the language of the Constitution so permits. That conclusion favours, although it is not determinative of, the proposition that s 122 is subject to limitations on legislative powers which are of general application.¹¹²

Gummow and Hayne observed that, ‘the tenor of decisions since *Teori Tau* indicates a retreat from the “disjunction” seen in that case between s 122 and the remainder of the structure of government established and maintained by the Constitution’.¹¹³ The proper approach, their Honour’s explained, was to view s 122 as ‘but one of several heads of legislative power given to the national legislature of Australia’. On this view, ‘a law which is made under s 122 is made in exercise of the legislative power of the Parliament and operates according to its tenor throughout the area of the Parliament’s authority’.¹¹⁴ Finally, in Kirby J’s view:

It would be to adopt an extremely artificial interpretation of the Constitution to accept that Australian nationals and electors of the Commonwealth who live in the territories are, for constitutional purposes, somehow disjoined from the Commonwealth. Likewise, it would be very artificial to regard the arrangements which the Constitution puts in place for the integrated Judicature of the nation as suggesting that territory courts are linked to this Court by statute only and that territory courts might be validly removed from the integrated Judicature provided for in Ch III.¹¹⁵

¹¹² *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 353-54 [74].

¹¹³ *Ibid* 387-388 [188].

¹¹⁴ *Wurridjal v Commonwealth* (2009) 237 CLR 309, 387-88 [188].

¹¹⁵ *Ibid* 419 [286].

Wurridjal confirms that s 122 must be exercised in accordance with s 51 (xxxi), and also stands for the broader proposition that s 122 is generally subject to the legislative limitations imposed by Ch I. The latter of Kirby J's reasons in *Wurridjal* connects this aspect of the integration principle with the second (Ch III) aspect of the integration principle; viz. the assurance of the High Court's place at the apex of the Australian judiciary. This aspect of the integration principle had previously been emphasised in respect of s 122 by Gummow J in *Kruger v Commonwealth*:

It is fundamental that the Constitution creates an 'integrated system of law', and a 'single system of jurisprudence'. The entrusting by Ch III, in particular by s 73, to this Court of the superintendence of the whole of the Australian judicial structure, its position as ultimate interpreter of the common law of Australia and as guardian of the Constitution are undermined, if not contradicted, by acceptance, as mandated by the Constitution, of the proposition that it is wholly within the power of the Parliament to grant or withhold any right of appeal from a territorial court to this Court.¹¹⁶

If it is accepted that territory courts must form part of Australia's integrated judicial system for the Constitution to function effectively, and that a right of appeal must therefore be guaranteed from territory courts to the High Court, it follows that the supreme courts (if not all courts) of self-governing territories must (contrary to the disparate view) be either 'federal courts' created by Parliament, or 'other courts' in which Parliament has vested judicial power under s 71.¹¹⁷ If they can be classified

¹¹⁶ *Kruger v Commonwealth* (1997) 190 CLR 1, 175. A majority of the High Court nevertheless held that the legislative power conferred by s 122 was not restricted by certain implied rights (including equality before the law): 44 (Brennan CJ), 63 (Dawson J), 142 (McHugh J), 153 (Gummow J). The dissenting judges did find s 122 to be so restricted: 95 (Toohey J), 112 (Gaudron J).

¹¹⁷ Pauling and Browning, above n 51, 60, 64.

within one these categories, then a right of appeal will be guaranteed by s 73 (ii). Case law in this respect has been inconsistent and conflicted,¹¹⁸ but since the courts of the three self-governing territories are now constituted by territory legislation (and can no longer be considered creatures of the Commonwealth), logic suggests that they should be considered ‘other courts’ for the purposes of s 73; bringing them within Ch III on the same footing as State courts.¹¹⁹

The High Court does not appear to have concerned itself with whether the territories are or are not self-governing.¹²⁰ Indeed, it is now ‘generally accepted that the courts of [all of] the territories may, and do, exercise federal jurisdiction’.¹²¹ Such was the conclusion, for example, of Gaudron J in *Northern Territory v GPAO*:

Given the terms of s71 and the purpose of s77(iii) of the Constitution, there is, in my view, no reason to read “such other courts as it invests with federal jurisdiction” in s71 as if it read “such other *State* courts as it invests with federal jurisdiction”. And once those words are given their natural and ordinary meaning, they are clearly capable of including non-federal courts created under s122 of the Constitution. To read s71 in this way is simply to

¹¹⁸ McDonald, above n 51, 79.

¹¹⁹ Pauling and Browning, above n 51, 60-64.

¹²⁰ It is uncertain whether it is appropriate to distinguish between classes of Territory. In *Spratt v Hermes* 114 CLR 226, 240, for example, Barwick CJ stated that, ‘I draw no distinction between the Australian Capital Territory and any other of the territories of the Commonwealth for I think that none can or should be drawn’. Nevertheless, there is no doubt that the citizens of certain territories have historically been treated unequally. See Hanks, Keyzer and Clarke, above n 47 [12.3.5].

¹²¹ McDonald, above n 5, 79; citing (in addition to *Northern Territory v GPAO*, below): *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 339–40 [33] (Gaudron J), 348–9 [63]–[67] (Gummow and Hayne JJ); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 518–19 [18]–[19], 530 [51]–[54], 532 [58] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Putland v The Queen* (2004) 218 CLR 174, 178–179 [4] (Gleeson CJ), 187–188 [33] (Gummow and Heydon JJ; Callinan J agreeing), 199 [73] (Kirby J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 326 [28] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

put courts created under s122 on a constitutional footing comparable with State courts.¹²²

It remains unclear whether the jurisdiction of territory courts is to be considered *entirely* federal in nature,¹²³ but that they exercise federal jurisdiction at all is sufficient to found the conclusion that they form part of Australia's integrated judicial system, and that the incompatibility component of the *Kable* doctrine will therefore apply to them.¹²⁴ This conclusion was confirmed by the Full Bench of the High Court in *NAALAS v Bradley* ('*Bradley*').¹²⁵

Bradley concerned the validity of the appointment of Hugh Bradley to the position of Chief Magistrate in the Northern Territory. Mr Bradley had been appointed until the age of 65 in accordance with s 7 the *Magistrates Act* (NT). However, and in accordance with s 6 of the Act, Mr Bradley had negotiated certain terms of employment directly with the government. The resultant package included a luxury car and a salary higher than his predecessor, but was limited, crucially, to a term of two years. The appellants argued that, by placing the subsequent remuneration of magistrates in the hands of the executive government, the 'legislation failed to provide a minimum characteristic of an independent and impartial tribunal for the

¹²² *Northern Territory v GPAO* (1999) 196 CLR 553, 604 – 605 [128]-[133] (Gaudron J)

¹²³ Zelmen Cowen and Leslie Zines argue in the affirmative, *Federal Jurisdiction in Australia* (3rd ed, 2002) 187-8. As does McDonald, above n 51. In contrast, Pauling and Browning argue, inter alia, that 'to suggest that Territory courts are courts which always and only exercise federal jurisdiction is...to drag self-governing territories, and their courts, back into the *Boilermakers*' case era, a time when self-governing territories had not yet been conceived'. Above n 51, 68.

¹²⁴ McDonald, above n 51, 90.

¹²⁵ (2004) 218 CLR 146 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). For an in-depth analysis of this aspect of the decision see Patrick Keyzer, 'Judicial Independence in the Northern Territory: Are Undisclosed Remuneration Arrangements Repugnant to Ch III of the Constitution?' (2004) 32 *University of Western Australia Law Review* 30.

adjudication of adversary litigation'.¹²⁶ It followed, so the appellant contended, that the relevant provisions of the *Act* (and thus Mr Bradley's appointment) were invalid as they were incompatible with that Court's capacity to exercise Commonwealth judicial power. Thus, the appellants sought to extend the *Kable* doctrine in two ways; first, they contended that the doctrine applied to territory courts and, second, they contended that the doctrine controlled the constitution of courts (by applying a test of incompatibility). The second of these contentions was rejected, and is considered in the following section. As to the first contention, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ accepted in a joint judgment that

it is implicit in the terms of Ch III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal.¹²⁷

The Full Bench's acceptance of this proposition confirmed that the *Kable* doctrine was to extend to all courts vested with federal judicial power, whether State or territory,¹²⁸ and whether actually exercising federal judicial power or not.¹²⁹ It also confirmed that territory courts were generally to be considered part of Australia's integrated judicial system (although the broader implications of this principle will not necessarily be identical in the territories and the States because, for one, there is no requirement that the supreme courts of the territories remain in existence).¹³⁰

¹²⁶ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 171 [61].

¹²⁷ *Ibid* 163 [29].

¹²⁸ Wheeler, 'The *Kable* doctrine and State Legislative Power Over State Courts' (2005) *Australasian Parliamentary Review* 15, 21.

¹²⁹ Carney, *The Constitutional Systems of the Australian States and territories*, above n 47, 357.

¹³⁰ McDonald, above n 51, 91; Wheeler, 'The *Kable* doctrine and State Legislative Power Over State Courts', above n 128, 21, 23.

Whether the term ‘capable of exercising’ might, in fact, have further extended the jurisdictional reach of the integration principle was not clear at this stage. At least one commentator had suggested that this reference was limited to courts actually vested with Commonwealth judicial power, ‘rather than to any court which might be vested in the future’.¹³¹ However, shortly after *Bradley*, in *Baker v The Queen*, McHugh, Gummow, Hayne and Heydon JJ reached the opposite conclusion, stating that the ‘doctrine in *Kable* is expressed to be protective of the institutional integrity of the State courts as recipients and *potential* recipients of federal jurisdiction’.¹³² In *K-Generation Pty Ltd v Liquor Licensing Court* (*‘K-Generation’*), Gummow, Hayne, Heydon, Crennan and Kiefel JJ applied this broader interpretation, refusing to ‘deny to [the South Australian Liquor Licensing Court] the character of a court of a State within the meaning of s 77(iii) of the Constitution’.¹³³ This was despite the fact that the Liquor Licensing Court was established by State legislation and was not vested with federal judicial power. Once again the decision concerned the application of *Kable*. In Their Honours’ view:

Consistently with Ch III, the States may not establish a “court of a State” within the constitutional description and deprive it, whether when established or subsequently, of those minimum characteristics of the institutional independence and impartiality identified in the decisions of this Court.¹³⁴

¹³¹ Carney, above n 47, 357.

¹³² (2004) 223 CLR 513, [51] (emphasis added).

¹³³ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471, 497 [131]. Section 77(iii) confers upon Parliament the power to make laws ‘investing any court of a State with federal jurisdiction’.

¹³⁴ *Ibid* 501 [153]. French CJ agreed with this aspect of the joint judgment, at 491 [99].

The preceding section has endeavoured to demonstrate two points. The first point is that the integration component of *Kable* cannot be viewed in isolation. Certainly, *Kable* was a significant milestone in the recognition of Australia's integrated judicial system, but it was not the progenitor of it. Moreover, it reflects only part of it; asserting the High Court's place at the apex of the court system established by Ch III. Notions of integration have been developing for decades under the auspices of s 122, in order to secure two objectives: to restrict Parliament's legislative power under s 122 to the general requirements of Ch I, and to ensure an avenue of appeal to the High Court from the territories (the '*Spratt*' stream). *Bradley* merges the *Kable* doctrine with the *Spratt* stream, and funnels both streams towards ensuring the High Court's role at the apex of Australia's integrated judicial system (thereby securing its appellate jurisdiction).¹³⁵

The second point flows from the first, and can be stated directly: whatever the incompatibility component of the *Kable* doctrine requires, it will require it of all courts, whether, federal, State or territory, whether exercising federal judicial power or not, and whether actually vested with federal judicial power or not. However, and as Patrick Keyzer has observed, while 'the High Court has been willing to accept these novel and controversial jurisdictional extensions of Ch III, it seems to have been quite unable to develop convincing principles to support the 'institutional integrity' of Australian Courts'.¹³⁶ It follows that although the *Kable* doctrine will notionally limit the ability of all Australian courts to engage in judicial mediation, the extent to which it will do so in practice is far from certain.

¹³⁵ Judicial mediation is examined in light of this objective below, in Chapter 8 nn 206-14 and accompanying text.

¹³⁶ See Patrick Keyzer, "'Preserving Due Process of Warehousing the Undesirables': To What End the Separation of Judicial Power of the Commonwealth?" above n 30, 102.

When will incompatibility arise under Kable?

The following section examines the development of the incompatibility component of *Kable*, and demonstrates that the criteria of incompatibility (originally framed in broad notions of public confidence) have now been reframed by reference to (equally broad) notions of independence and impartiality. It is concluded that a function will rarely if ever be incompatible with institutional integrity, and that *Kable* is therefore unlikely to hinder the development of judicial mediation in the States and territories.

Again, the starting point for this argument is the reasoning of the majority in *Kable*. Gaudron J was of the opinion that, the ‘integrity of the courts depends on their acting in accordance with the judicial process and, in no small measure, on the maintenance of public confidence in that process’.¹³⁷ This extract suggested two distinct measures of integrity; compliance with the ‘judicial process’ and the maintenance of ‘public confidence’. It is worth making explicit the fact, however, that Gaudron J’s references to judicial process were not intended to import the full ambit of procedural limitations applicable in a federal context to State courts.¹³⁸ By grounding the doctrine in the need to maintain Australia’s integrated judicial system, Gaudron J implicitly restricted the scope of the doctrine to those requirements of the judicial process necessary to maintain the integrity of the federal system (which may differ between courts and jurisdictions, as do the requirements of due process generally):

¹³⁷ *Kable v DPP* (NSW) (1996) 189 CLR 51, 107.

¹³⁸ These limitations were discussed at length in Chapter 4 above, nn 50-209 and accompanying text. The same term was previously adopted by Her Honour in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703-04, and *Leeth v Commonwealth* (1992) 174 CLR 455, 501-02. The reach of the judicial process implication in a procedural fairness context was subsequently clarified by Her Honour in *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496; *Nicholas v The Queen* (1998) 193 CLR 173; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [79]; and *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

Public confidence cannot be maintained in the courts and their criminal processes if, as postulated by s 5(1), the courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may not be admissible in legal proceedings, that on the balance of probabilities they may do so ... [Moreover, public] confidence in the courts requires that they act consistently and that their proceedings be conducted according to rules of general application. That is an essential feature of the judicial process. It is that feature which serves to distinguish between palm tree justice and equal justice.¹³⁹

Thus, for Gaudron J, it was the need to maintain public confidence in Australia's judicial system that mandated an adherence to minimum judicial standards. However, and significantly, Gaudron J did not express any particular view (beyond the facts) as to what those minimum standards were or should be.¹⁴⁰ As pointed out in Chapter 4, Gaudron J's references to equal justice must now also be reconsidered in light of the joint judgment in *Leeth*,¹⁴¹ and (in a s 122 context) the view of the majority in

¹³⁹ *Kable v DPP (NSW)* (1996) 189 CLR 51, 107.

¹⁴⁰ Nor was Her Honour directly concerned by the need to protect individual rights. As Fiona Wheeler has observed; 'Mr Kable was freed from the continuing threat of civil detention because of a finding that the *Act* damaged the institutional integrity of the Supreme Court. In accordance with the Kable doctrine, it was the effect of the *Act* on the Supreme Court, rather than on Mr Kable, which was the source of invalidity'. Wheeler, 'The Kable doctrine and State Legislative Power Over State Courts', above n 128, 19. This approach is consistent with Gaudron J's definitional approach to implied rights in a federal context, which, in the absence of any specific constitutional recognition of the rights themselves, draws upon the nature of the 'judicial process'. See above Chapter 4 nn 37-39 and accompanying text.

¹⁴¹ *Leeth v Commonwealth* (1992) 174 CLR 455, 469 (Mason CJ, Dawson and McHugh JJ). The majority found 'no basis for the proposition that substantive equality is constitutionally guaranteed'. See above Chapter 4 nn 60-64 and accompanying text.

Kruger.¹⁴² The majority opinion in the joint judgment in *Baker v The Queen* affirms that this conclusion applies equally State legislation.¹⁴³

McHugh J also considered the requirements of the judicial process and public confidence to be key indicators of institutional integrity. Having established that neither State parliaments nor the federal Parliament could ‘legislate in a way that might alter or undermine the constitutional scheme set up by Ch III of the Constitution,’¹⁴⁴ His Honour reasoned that State and federal parliaments were also prevented from legislating

in a way that permits the Supreme Court while exercising federal judicial power to disregard the rules of natural justice or to exercise legislative or executive power. Such legislation is inconsistent with the exercise of federal judicial power.¹⁴⁵

These comments were, of course, confined to the exercise of federal judicial power, and were not intended to limit State legislative power or the functions that may be vested in State courts when exercising State judicial power alone. Indeed, and as discussed in more detail below, McHugh J’s subsequent comments in *Fardon* suggest

¹⁴² *Kruger v Commonwealth* (1997) 190 CLR 1, 175. A majority of the High Court held that there was no implied right of equality within s 122: 44 (Brennan CJ), 63 (Dawson J), 142 (McHugh J), 153 (Gummow J). The dissenting judges did find s 122 to be so restricted: 95 (Toohey J), 112 (Gaudron J). See above Chapter 4 n 64 and accompanying text.

¹⁴³ *Baker v The Queen* (2004) 223 CLR 513, 533 [45]. With reference to a potentially discriminatory provision in the *Sentencing Act 1989* (NSW), McHugh, Gummow, Hayne and Heydon JJ noted that the appellant had not attempted ‘to imply a restriction upon State legislative power akin to the express provision proscribing denial of “the equal protection of the laws” found in s 1 of the Fourteenth Amendment to the United States Constitution. Such an attempt, at a federal level, respecting the powers of the Parliament, would have to overcome the reasoning of the majority in *Leeth v The Commonwealth*. That reasoning gives no encouragement to the implication of a constitutional restriction upon State legislative power’.

¹⁴⁴ *Kable v DPP* (NSW) (1996) 189 CLR 51, 115.

¹⁴⁵ *Ibid* 116.

that State courts/legislatures can very easily disregard the rules of natural justice without undermining institutional integrity.¹⁴⁶ However, McHugh J considered that the need to maintain ‘public confidence in the impartial exercise of federal judicial power’¹⁴⁷ did impose two broad limitations on State legislative power. First of all, in His Honour’s view, public confidence required that State supreme courts could not be vested with non-judicial functions in respect of non-federal matters if ‘that might lead ordinary reasonable members of the public to conclude that the Court was not independent of the executive government of the States’.¹⁴⁸ Secondly, State supreme courts could not be vested with non-judicial functions ‘so extensive or of such a nature that the Supreme Court would lose its identity as a court’.¹⁴⁹ Thus, for McHugh J as for Gaudron J, it was the maintenance of public confidence that was critical to institutional integrity; not any specific vision as to how the judicial process should operate in the States.

Gummow J adopted similar reasoning to Gaudron and McHugh JJ, noting, as a preliminary matter, that the power to order incarceration without a prior determination of criminal guilt ‘could not be conferred by a law of the Commonwealth upon this Court, any other federal court, or a State court exercising federal jurisdiction’.¹⁵⁰ Accepting that this would not always prevent the conferral of non-judicial functions on the NSW Supreme Court by the NSW legislature, however, His Honour found that s 5(1) jeopardised ‘the integrity of the federal or State court in question in the exercise in other cases of the judicial power of the Commonwealth ... [because it] saps the

¹⁴⁶ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 600 [40].

¹⁴⁷ *Kable v DPP (NSW)* (1996) 189 CLR 51, 116.

¹⁴⁸ *Ibid* 119.

¹⁴⁹ *Ibid* 117.

¹⁵⁰ *Ibid* 132.

appearance of institutional impartiality and the maintenance of public confidence'.¹⁵¹ As with Gaudron and McHugh JJ, Gummow J offered little guidance as to which other functions might be incompatible with the judicial process and institutional integrity, but it is clear that His Honour's reasoning flowed from the status of the federal judiciary as opposed to the integrity of State courts per se.

Consistent with his narrow approach,¹⁵² Toohey J drew on the third limb of the incompatibility test in *Grollo* to find that s 5(1) was a non-judicial function, 'because it requires the Supreme Court to participate in the making of a preventive detention order where no breach of the criminal law is alleged and where there has been no determination of guilt'.¹⁵³ As such, in His Honour's view:

The function exercised by the Supreme Court under the Act offends Ch III which, as I said in *Harris v Caladine*,¹⁵⁴ reflects an aspect of the doctrine of separation of powers, serving to protect not only the role of the independent judiciary but also the personal interests of litigants in having those interests determined by judges independent of the legislature and the executive.¹⁵⁵

Whether *Grollo* incompatibility can properly be applied in a State court context is debatable,¹⁵⁶ but the fact remains that the pivotal requirement for Toohey J was, as with Gaudron, McHugh and Gummow JJ, the need to maintain public confidence in

¹⁵¹ *Kable v DPP* (NSW) (1996) 189 CLR 51, 133.

¹⁵² See above nn 39-41 and accompanying text.

¹⁵³ *Kable v DPP* (NSW) (1996) 189 CLR 51, 98.

¹⁵⁴ (1991) 172 CLR 84, 135. 'In the end it is personal interests rather than structural interests that demand protection; but the two are interdependent and to weaken the latter is inevitably to damage the former'.

¹⁵⁵ *Kable v DPP* (NSW) (1996) 189 CLR 51, 98.

¹⁵⁶ See above Chapter 5 nn 14-19 and accompanying text.

the independence and impartiality of the judiciary.¹⁵⁷ That being said, it is the ‘integrated’ approach adopted by Gaudron, McHugh and Gummow JJ (subsequently endorsed by Kirby J in *Gould v Brown*)¹⁵⁸ which emerges as the proper foundation of the *Kable* doctrine (albeit a ‘fragile’ one).¹⁵⁹

Given the divergent approaches adopted by the majority judges in *Kable*, it is difficult to discern a test for the future application of the doctrine or, indeed, the circumstances (other than detention without adjudgment of criminal guilt) which might enliven it. This piecemeal approach to the scope of *Kable* incompatibility has continued to characterise High Court precedent in this area. As Fiona Wheeler has observed:

The High Court has tended to explore the question whether a function or arrangement is incompatible with the institutional integrity of a state court on a case-by-case basis, focussing on the specific features of the legislation under challenge. While this incremental approach is consistent with traditional judicial method, it provides limited guidance for state law-makers concerned to ensure the validity of their legislative schemes.¹⁶⁰

The majority judgments indicate that ‘the underlying concern [in *Kable*] was to maintain public confidence in the independence of State courts’.¹⁶¹ This ‘underlying

¹⁵⁷ It is generally accepted that, ‘the underlying concern [in *Kable*] was to maintain public confidence in the independence of State courts’. Johnston and Hardcastle, above n 27, 220.

¹⁵⁸ (1998) 193 CLR 346, 485-86.

¹⁵⁹ Johnston and Hardcastle, above n 27, 221.

¹⁶⁰ Wheeler, ‘The *Kable* doctrine and State Legislative Power Over State Courts’, above n 128, 22.

¹⁶¹ Johnston and Hardcastle, above n 27, 220. Elizabeth Handsley has stated that the ‘majority judges’ repeated claim that the basis of the incompatibility doctrine is the necessity of public confidence to the effective exercise of the judicial power is a very concrete one, so it is not unreasonable to expect some concrete evidence to back it up. Even if it cannot be questioned whether public confidence is necessary to the effective exercise of judicial power, the High Court should be willing to offer some clear evidence of the effect its doctrine seeks to avoid before it strikes down legislation which is otherwise within power. Of course there are severe doubts as to whether the High Court has the resources needed

concern' rested upon the suggestion that the integrity of State courts reflected upon the integrity of the federal judicial system ('institutional integrity'). Thus, a function was to be considered incompatible with the exercise of federal judicial power if it undermined public confidence in the integrity of a court belonging to the Australian judiciary.

Subsequent challenges under the *Kable* doctrine demonstrate that public confidence is no longer the touchstone of incompatibility, and that the doctrine will seldom result in the invalidity of State/territory legislation.¹⁶² Indeed, since its inception the *Kable* doctrine has only been successfully applied in two instances; first by the Queensland Court of Appeal in *Re Criminal Proceeds Confiscation Act 2002* ('*Re Criminal Proceeds*'),¹⁶³ and more recently by the Supreme Court of South Australia in *Totani v South Australia (Totani)*.¹⁶⁴ All other attempts have failed, prompting Kirby J to question whether *Kable* was 'a constitutional guard-dog that would bark but once'.¹⁶⁵ It might be wondered, on this basis, whether the term public confidence was not in

to gather such information. However, the answer to this observation is not to dispense with the information but to dispense with the doctrine. A doctrine which requires the production of information which the High Court is institutionally incapable of gathering simply has no place in the High Court's arsenal'. Above n 15, 176.

¹⁶² According to Peter Johnston and Rohan Hardcastle, 'a high degree of incompatibility is required to undermine public confidence in the independence of State courts'. Above n 27, 232. In *Nicholas v The Queen* (1998) 193 CLR 173, 255 [201], Kirby J stated that 'The separation and integrity of the judicial power, universally regarded as essential to the independence of the judicial function generally, is specially important in a federal system of government. There the judiciary, especially in the courts constituted or invested with jurisdiction under the Constitution, must regularly determine disputed questions concerning constitutional power and large questions affecting the life of the nation as a whole. This is why the separation of the judicial power has been described as "a vital constitutional safeguard"'.

¹⁶³ [2004] 1 Qd R40. Although other legislative provisions have been impugned. For example, in *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39, it was argued that ss 46(2), 49(4) and 154(1) of the *Criminal Property Forfeiture Act 2002* (NT) were invalid on the basis that they substantially impaired the institutional integrity of the Supreme Court of the Northern Territory by requiring that court to undermine procedural fairness. The Northern Territory Court of Appeal accepted that the *Kable* doctrine had implications for Territory courts, but nevertheless held the legislation to be valid.

¹⁶⁴ [2009] SASC 301.

¹⁶⁵ *Baker v The Queen* (2004) 223 CLR 513, 535 [54] (Kirby J).

fact a proxy for some other constitutional purpose. Elizabeth Handsley has suggested that:

The better conclusion is that the incompatibility doctrine [or the incompatibility component of the *Kable* doctrine] is not about maintaining public confidence in the judiciary at all. It is about limiting legislative and executive power, by preventing those branches from avoiding political responsibility for their actions.¹⁶⁶

Accepting the first part of this conclusion, an alternative (or complementary) explanation for the second part is that *Kable* is about limiting legislative and executive power in matters affecting the inherent jurisdiction of Australian courts and, thereby, the effectiveness of the High Court's appellate jurisdiction. This conclusion would be consistent with the conclusions reached in Chapter 4, where it was shown, inter alia, that the integrity component of the judicial process implication (originally measured by reference to public confidence) has never resulted in invalidity in federal jurisdiction.¹⁶⁷ One possible explanation for this underperformance, offered in Chapter 4, is that the judiciary are not directly concerned with 'civil liberties, but about the limits of legislative and executive power and supremacy of the judiciary in deciding such questions'.¹⁶⁸

¹⁶⁶ Handsley, above n 15, 179.

¹⁶⁷ *Nicholas v The Queen* (1998) 193 CLR 173, 222 [115] (McHugh J), 208 [73] (Gaudron J), 255 [201] (Kirby J).

¹⁶⁸ Brian Galligan, *Politics of the High Court* (1987), 203. This conclusion is supported by the Supreme Court of South Australia's recent decision in *Totani v South Australia* [2009] SASC 301. In that instance, the fatal defect in s 14(1) of the *Serious and Organised Crime Control Act* (SA) lay in the fact that it removed judicial discretion entirely, replacing it with an executive declaration. See below n 222-224 and accompanying text.

The following section develops the proposition that the object of *Kable* is, in fact, to maintain the legitimacy of the federal judicial system by asserting the High Court's appellate jurisdiction over all Australian Courts, and, to the extent necessary, the inherent jurisdiction of those courts (as opposed to any particular view as to the minimum judicial standards permissible in the States and territories).¹⁶⁹ This proposition is demonstrated by an examination of two factors of particular significance to the undermining of the *Kable* doctrine. The first factor is continuing uncertainty as to the criteria by which incompatibility is to be determined. The second factor is the High Court's commitment to a presumption in favour of legislative validity. This necessarily lengthy section is essential to the question whether State and territory judges can mediate because, as will be seen, judicial mediation legislation is highly unlikely to be interfere with the inherent jurisdiction of State/territory courts. It has already been explained that judicial mediation will not interfere with the appellate jurisdiction of the High Court.¹⁷⁰

¹⁶⁹ This has been recognised on numerous occasions, In *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 586 [2], for example, Gleeson CJ observed that the 'constitutional objection to the legislative scheme is not based, or at least is not directly based, upon a suggested infringement of the appellant's human rights. The objection is based upon the involvement of the Supreme Court of Queensland in the process. It is the effect of the legislation upon the institutional integrity of the Supreme Court, rather than its effect upon the personal liberty of the appellant, that is said to conflict with the requirements of the Constitution'. Kirby J similarly noted in *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 133 [225], that laws protecting individual rights (such as disqualification for apprehension of bias) exist 'to repair individual infractions in particular cases', whereas the *Kable* doctrine operates to remedy complaints that are more 'fundamental in character and concerned [with] the validity of institutional arrangements'. These views in turn reflect the doctrine of 'responsible government', which rejects entrenched individual constitutional rights in favour of a system of parliamentary democracy whereby the judiciary protects the democratic process as opposed to protecting individual rights per se. See *Attorney General (Commonwealth); Ex rel McKinley v Commonwealth* (1975) 135 CLR 1; Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 188.

¹⁷⁰ See above Chapter 3 nn 91-93.

What are the ‘criteria’ of incompatibility?

Re Criminal Proceeds concerned the validity of certain provisions of the *Criminal Proceeds Confiscation Act 2002* (Qld), Chapter 2 of which set out procedures for the issue of an interim order restraining persons in possession of illegally acquired goods (whether convicted in respect of those goods or not) from dealing further with those goods. Section 30 of the *Act* required, inter alia, that on the application for such an order by certain listed persons (principally law enforcement):

the court must hear the application -

- (a) in the absence of a person whose property is the subject of the application; and
- (b) without the relevant person having been informed of the application.¹⁷¹

Having established that s 30 constituted ‘a legislative command to the judge of the Supreme Court hearing the application to proceed “in the absence of” affected parties,¹⁷² which clearly ‘abrogated’ the principles of natural justice, Williams JA turned to consider whether the *Act* was invalid by virtue of the *Kable* doctrine.¹⁷³ Placing particular emphasis upon the ‘essential characteristics of the judicial process’ identified by Gaudron J in *Nicholas v The Queen*,¹⁷⁴ His Honour found that s 30 constituted an unconstitutional interference with the judicial process ‘repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.’¹⁷⁵

¹⁷¹ *Criminal Proceeds Confiscation Act 2002* (Qld), s 30 (3).

¹⁷² *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40, 45 [11].

¹⁷³ *Ibid* 50 [39].

¹⁷⁴ *Nicholas v The Queen* (1998) 193 CLR 173, 208 [73 – 74].

¹⁷⁵ *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40, 55 [58]

Asking a judge to make a decision on such issues in those circumstances makes a mockery of the exercise of the judicial power in question. The statutory provision removes the essential protection of the citizen inherent in the judicial process. Effectively the provision directs the court to hear the matter in a manner which ensures the outcome will be adverse to the citizen and deprives the court of the capacity to act impartially.¹⁷⁶

It is apparent that the fatal flaw in s 30 lay in its directive nature, which precluded a broad interpretation of s 30 acknowledging the Supreme Court's inherent jurisdiction to ensure fairness in legal proceedings and to avoid an abuse of process. The legislation also struck at the heart of the *Kable* doctrine by undermining procedural fairness in a criminal context. Thus, while *Re Criminal Proceeds* would appear to have been correctly decided given the nature of the provision in question,¹⁷⁷ it offers little guidance as to the broader circumstances in which incompatibility will arise.

In *Bradley* (the facts of which are set out above), the Full Bench of the High Court rejected the appellants argument that s 6 the *Magistrates Act* (NT) undermined the institutional integrity of the NT Magistrates Court by placing the future remuneration of Mr Bradley in the hands of the executive government. According to McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, the *Act* did not

render the magistracy of the Territory or the office of the Chief Magistrate inappropriately dependent on the legislature or executive of the Territory in a way incompatible with requirements of independence and impartiality. It

¹⁷⁶ *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40, 55 [57].

¹⁷⁷ But see the comment of Bleby J in *Totani v South Australia* [2009] SASC 301, 76, that the 'case must be now regarded as doubtful authority given the formulation of the *Kable* principle adopted by Williams J in that case, and subsequent High Court authority.'

does not compromise or jeopardise the integrity of the Territory magistracy or the judicial system. Nor is it apt to lead reasonable and informed members of the public to conclude that the magistracy of the Territory was not free from the influence of the other branches of government in exercising their judicial function.¹⁷⁸

The joint judgment accepted the view, expressed by Gaudron J in *Ebner*, that impartiality ‘and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system,’¹⁷⁹ but made no direct comment as to the suitability of public confidence as a criterion of integrity. Their Honours also avoided any prescriptive analysis of the circumstances that might give rise to incompatibility under the *Kable* doctrine. The difficulty, the joint judges explained, is that such questions require

discernment of the relevant minimum characteristic of an independent and impartial tribunal exercising the jurisdiction of the courts over which the Chief Magistrate presides. No exhaustive statement of what constitutes that minimum in all cases is possible.¹⁸⁰

In Chapter 4 it was explained that, following *Kable* but prior to *Bradley*, public confidence had been all but debunked as a measure of constitutional validity in respect of functions vested in Ch III courts.¹⁸¹ Any lingering concern that the maintenance of public confidence represented a free standing constitutional principle was resolutely disposed of by the High Court in *Fardon v Attorney General*

¹⁷⁸ (2004) 218 CLR 146, 172 [65].

¹⁷⁹ Ibid 162 [27]; citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363 [81].

¹⁸⁰ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [30].

¹⁸¹ See above Chapter 4 nn 194-98.

(*'Fardon'*),¹⁸² *Baker v The Queen* (*'Baker'*),¹⁸³ and *Forge v Australian Securities and Investment Commission* (*'Forge'*).¹⁸⁴

In *Fardon*, the High Court considered a legislative scheme similar to that invalidated in *Kable*. Part 2, Div 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) provided that the Supreme Court of Queensland could order the continued and indefinite detention of persons previously convicted of serious sexual offences, and who had already served their sentences. The appellant (the subject of a continued detention order) argued that this function was incompatible with the institutional integrity of the Court. For reasons set out in the following section, the High Court rejected the appeal. As a separate matter, Gleeson CJ stated (in accordance with Brennan CJ and Hayne J's earlier comments in *Nicholas*)¹⁸⁵ that

Nothing that was said in *Kable* meant that a court's opinion of its own standing is a criterion of validity of law. Furthermore, nothing would be more likely to damage public confidence in the integrity and impartiality of courts than judicial refusal to implement the provisions of a statute upon the ground of an objection to legislative policy.¹⁸⁶

Gummow and Kirby J also dismissed public confidence as a discrete criterion in determining the validity of a given statute or provision. According to Gummow J:

¹⁸² (2004) 223 CLR 575.

¹⁸³ (2004) 223 CLR 513.

¹⁸⁴ (2006) 228 CLR 45.

¹⁸⁵ *Nicholas v The Queen* (1998) 193 CLR 173, 197 [37] (Brennan CJ), 275 [242] (Hayne J).

¹⁸⁶ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 593 [23].

Although in some of the cases considering the application of *Kable*, institutional integrity and public confidence perhaps may have appeared as distinct and separately sufficient considerations, that is not so. Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity.¹⁸⁷

All of the majority judges appeared to agree with Gummow J that the appropriate test was one of ‘institutional integrity’; to be informed by (but not dictated by) notions of public confidence and compatibility with the requirements of the judicial process.¹⁸⁸ Once again, however, no general unifying principle was offered by which to determine when a function would be incompatible with institutional integrity. Gummow J (with whom Hayne J agreed)¹⁸⁹ reiterated the view of the High Court in *Bradley*, explaining that, as ‘with *Kable* and the present case, the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes’.¹⁹⁰ However, McHugh J did attempt to narrow the circumstances in which incompatibility might arise under the *Kable doctrine*. His Honour warned that:

It is a serious constitutional mistake to think that either *Kable* or the Constitution assimilates State courts or their judges and officers with federal courts and their judges and officers. The Constitution provides for an integrated court system. But that does not mean that what federal courts cannot do State courts cannot do ... nothing in Ch III prevents a State, if it

¹⁸⁷ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 617-18 [102], 629 -30 [144] (Kirby J).

¹⁸⁸ *Ibid* 591 [15] (Gleeson CJ), 617 [101] McHugh J, 652-53 [212]-[213] (Callinan and Heydon JJ). While Callinan and Heydon JJ said little of the constitutional principles involved, they appeared to accept that institutional integrity was the overarching principle to be applied.

¹⁸⁹ *Ibid* 647 [195].

¹⁹⁰ *Ibid* 618 [104].

wishes, from implementing an inquisitorial, rather than an adversarial, system of justice for State courts ... State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to law.¹⁹¹

This conclusion is broadly compatible with McHugh J's judgment in *Kable*, but in one respect it is troubling. As discussed in more detail in Chapter 7, the inquisitorial model does not adhere to common law notions of due process and natural justice, because in civil law countries 'fairness is inherent in the system'.¹⁹² Thus, were a State court *directed* to conduct proceedings in an inquisitorial manner, this may very well (contrary to McHugh J's suggestion) undermine the judicial process and prevent the court from acting impartially.¹⁹³ Granted, legislation enacting an inquisitorial system would almost certainly involve an increase in discretionary power, as opposed to the removal of that power (as in *Re Criminal Proceeds Act 2002*).¹⁹⁴ It is also highly unlikely that any such legislation would be directive in nature (as demonstrated by the statutory provisions comprising the LAT process discussed in Chapter 6).¹⁹⁵ Nevertheless, if judges were *required* to participate in an inquisitorial manner, it

¹⁹¹ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 598 [36], 600 -01[40]-[42].

¹⁹² Alison Creighton, 'An Adversarial System: A constitutional requirement' (1999) 74 *Reform* 65, 6.

¹⁹³ *Nicholas v The Queen* (1998) 193 CLR 173, 208 [73]-[74] (Gaudron J).

¹⁹⁴ See, for example, the discretions (discussed in Chapter 4) which were upheld in *Cominos v Cominos* (1972) 127 CLR 588; *Re Watson*; *Ex parte Armstrong* (1976) 136 CLR 248; *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617; *Truman v Truman* (2008) 216 FLR 365; *Crestin v Crestin* (2008) 39 Fam LR 420.

¹⁹⁵ But see *Totani v South Australia* [2009] SASC 301, where the South Australian Supreme Court held s 14(2) of the *Serious and Organised Crime Control Act* (SA) to be invalid, as it prevented the court from examining the basis of a declaration by the Attorney-General when issuing a control order. As such, s 14(2) purported to graft 'non-judicial powers onto the judicial process in such a way that the outcome is controlled to a significant and unacceptable extent, by an arm of the Executive Government which destroys the court's integrity as a repository of Federal Jurisdiction.' [157] (Bleby J).

seems likely that a reasonable apprehension of bias would arise and that this would be incompatible with the exercise of Ch III judicial power.

Shortly after *Fardon*¹⁹⁶ the High Court once again confirmed that public confidence was an inappropriate measure of legislative validity.¹⁹⁷ In *Baker* (the facts of which are set out in detail the following section), the appellant (convicted of murder and the subject of a non-release recommendation by the sentencing judge) argued unsuccessfully that certain provisions of the *Sentencing Act 1989* (NSW) were incompatible with the NSW Supreme Court's role as a repository of federal judicial power. As explained in more detail below, a majority of the High Court rejected Mr Baker's appeal on the basis that the discretionary power vested in the court was capable of being performed judicially.¹⁹⁸ As regards the role of public confidence as an indicator of incompatibility, Gleeson CJ stated that:

In some of the judgments in *Kable*, references were made to public confidence in the courts. Confidence is not something that exists in the abstract. It is related to some quality or qualities which one person believes to exist in another. The most basic quality of courts in which the public should have confidence is that they will administer justice according to law.¹⁹⁹

¹⁹⁶ In fact *Baker* was listed before *Fardon*, but the judgments in the former make numerous references to the latter.

¹⁹⁷ *Baker v The Queen* (2004) 223 CLR 513 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; Kirby J in dissent)

¹⁹⁸ See below nn 231-35 and accompanying text.

¹⁹⁹ *Baker v The Queen* (2004) 223 CLR 513, 519 [6].

Kirby J disagreed with the majority that the contested provisions of the *Act* were valid,²⁰⁰ but agreed with Gleeson CJ that public confidence was not an appropriate measure of validity:

Although a common element in the reasoning of the majority in *Kable* was the reference to the danger of losing public confidence in the integrated Judicature of Australia, I do not consider that this amounts to a separate, or sufficient, criterion for invalidating a State law. A court is not well placed to estimate with precision the impact if any, of particular legislation upon public opinion. At most, the reference to this consideration constitutes a legal fiction, constructed by judges in an attempt to explain and objectify their conclusions.²⁰¹

Kirby J conceded, in language recycled from his earlier judgment in *Nicholas*, that ‘it is impossible to frame criteria that are “at once exclusive and exhaustive.”’²⁰² However, in His Honour’s view, the difficulty of phrasing conclusive criteria should not prevent the High Court from adopting an approach ‘that is vigilant to defend the integrity of the branch of government which the Constitution places in their charge’.²⁰³ The approach posited by Kirby J (which seeks to refine the tools of statutory interpretation as opposed to the specific criterion of validity) is considered in the penultimate section of this Chapter.

²⁰⁰ *Baker v The Queen* (2004) 223 CLR 513, 561 [143].

²⁰¹ *Ibid* 542 [79]. His Honour’s comments regarding the court’s inability to estimate public opinion reflect the concerns raised by Elizabeth Handsley, above n 161.

²⁰² *Ibid* 543 [81]; citing *Nicholas v The Queen* (1998) 193 CLR 173, 256 [201]. This phrasing is in turn borrowed from *R v Davison* (1954) 90 CLR 353, 366 (Dixon CJ, McTiernan J).

²⁰³ *Ibid*, 543 [81].

In *Forge*,²⁰⁴ the High Court once again considered the application of the *Kable* doctrine; this time in relation to the appointment of acting judges. The Honourable Michael Leader Foster had been appointed to the NSW Supreme Court as an acting judge in accordance with s 37 of the *Supreme Court Act* 1970 (NSW). It was argued that Foster AJ's appointment was invalid because the appointment of acting judges was so extensive as to undermine the integrity of the Supreme Court (because it led to a reasonable apprehension of general judicial bias towards the government). Thus, the appellants sought to apply the *Kable* doctrine to the composition of courts (as in *Bradley*), as opposed to the functions vested in those courts (as in *Kable*, *Re Criminal Proceeds*, *Baker* and *Fardon*). The High Court held by a majority of six to one (Kirby J again dissenting) that s 37 was valid. Insofar as *Forge* concerned the appointment of acting judges much of the reasoning applied by the High Court is tangential in the current context. *Forge* nevertheless highlights the centrality of impartiality (and the appearance thereof) to the application of the *Kable* doctrine, and attempts (albeit unsuccessfully) to clarify the criteria of *Kable* incompatibility.

Gleeson CJ (with whom Callinan J agreed)²⁰⁵ thought it unlikely that legislation providing for the appointment of acting judges would enliven the *Kable* doctrine. His Honour accepted that State courts must meet the description of 'courts', and that an essential part of being a court is 'that it must satisfy minimum requirements of independence and impartiality'.²⁰⁶ However, in His Honours' opinion, not only do those requirements 'take account of considerations of history', but there 'are sound practical reasons why State governments might need the flexibility provided by a

²⁰⁴ (2006) 228 CLR 45.

²⁰⁵ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 136 [238].

²⁰⁶ *Ibid* 67 [41].

power to appoint acting judges’.²⁰⁷ In His Honour’s view, an abuse of power under s 37 might ‘in extreme cases’ undermine the integrity of the court, but those circumstances had not been demonstrated in the case at hand.²⁰⁸

In a joint judgment, Gummow, Hayne and Crennan JJ explained that ‘the relevant principle is one which hinges upon maintenance of the defining characteristics of a ‘court’, and that institutional integrity will be distorted if a court ‘no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies’.²⁰⁹ The joint judges rejected the idea that a ‘quantitative criterion for marking the boundary or permissible appointments’²¹⁰ provided a sound basis upon which to determine whether a court had ceased to satisfy this definition. As such, the appellant had failed to establish that an ‘informed observer’ might ‘reasonably conclude that the institution no longer is, and no longer appears to be, independent and impartial’.²¹¹

The approach adopted by the joint judges in *Forge* invites further speculation and uncertainty as to which judicial ‘characteristics’ are in fact ‘defining’ of a court – in much the same way as the *Boilermakers’ Case* led to ‘excessive subtlety and technicality’ in the identification of ‘judicial power’.²¹² Perhaps in an attempt to avoid sterile debate on the issue, Gummow, Hayne and Crennan JJ stated that:

²⁰⁷ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 68 [42].

²⁰⁸ *Ibid* 69 [46].

²⁰⁹ *Ibid* 76 [63] (Gummow, Hayne and Crennan JJ).

²¹⁰ *Ibid* 85 [90].

²¹¹ *Ibid* 86 [93].

²¹² *R v Joske; Ex parte Building Construction Employees and Builders’ Labourers’ Federation* (1974) 130 CLR 87, 90 (Barwick CJ). See generally, Patrick Lane, ‘The Decline of the Boilermakers Separation of Powers Doctrine’ (1981) 55 *Australian Law Journal* 6.

It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.²¹³

With the greatest of respect, to state that ‘institutional integrity’ is to be determined by reference to the minimum constitutional requirements of ‘courts’; that an important element in the character of Australian courts is the capacity to administer an ‘adversarial trial’; and that adversarial trials are characterised by an ‘independent and impartial tribunal’; is simply to define one nebulous term by reference to another in an endless conceptual loop.²¹⁴ As Anna Dziedzic has observed:

Criticisms levelled at the *Kable doctrine* — that it is an imprecise test that fails to adequately define notions of ‘integrity, independence and impartiality’ — are equally applicable to a new test that seeks to ascribe a core constitutional meaning to the word ‘court’.²¹⁵

After more than ten years, therefore, the best that can be said by way of a general or unifying principle for *Kable* incompatibility is that a function *may* undermine

²¹³ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 78 [68] (Gummow, Hayne and Crennan JJ). This explanation reflects the earlier judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 343 [3].

²¹⁴ The term ‘adversarial’ is notoriously difficult to define, and Australia does not have a ‘purely’ adversarial system. See, for example, Mark Nolan, ‘The Adversarial mentality versus the Inquisitorial mentality’, (2004) 16 (3) *Legaldate* 7, 7.

²¹⁵ Anna Dziedzic, ‘*Forge v Australian Securities and Investments Commission*: The *Kable* Principle and the Constitutional Validity of Acting Judges’ (2007) 35 *Federal Law Review* 129, 141.

institutional integrity if it prevents a court from acting independently and impartiality. As pointed out at the very beginning of this Chapter, the underlying object of the incompatibility doctrine (and, for that matter, the separation doctrine) is the maintenance of judicial independence and impartiality.²¹⁶ Thus, the High Court's answer simply restates the question.

As to the particular circumstances that might give rise to *Kable* incompatibility, *Bradley* and *Forge* make it clear that legislation affecting the constitution of State or territory courts will rarely invoke the doctrine; except in the most 'extreme cases'.²¹⁷ *Kable*, *Re Criminal Proceeds*, *Baker*, and *Fardon* all concerned 'functions' vested in courts as opposed to the constitution of those courts, and are therefore of more immediate relevance to the question whether mediation functions may be vested in State and territory courts. It is far from trivial to observe, however, that all of these cases concerned functions vested in courts exercising criminal jurisdiction, where 'the guarantee involved in the vesting of judicial power ... is at its most important'.²¹⁸ Given the general failure of *Kable* in criminal matters it seems highly doubtful that it would ever impede the development of civil procedures in State and territory courts. Interestingly, though, the joint judgment in *Forge* does not rule out this possibility. Gummow, Hayne and Crennan JJ drew attention to the majority judgment in *Ebner*, and the

²¹⁶ *Wilson v Minister for Aboriginal and Torres Strait Islanders* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process', above n 30, 253; Suri Ratnapala, *Australian Constitution Law: Foundations and Theory* (2nd ed 2007), 162; Zines, above n 21, 217.

²¹⁷ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 69 [46] (Gleeson CJ).

²¹⁸ *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 581 (Deane J).

fundamental importance which is attached to the principle that a court must be independent and impartial by the development of the apprehension of bias principle. Even the appearance of departure from the principle that the tribunal must be independent and impartial is prohibited lest the integrity of the judicial system be undermined.

The joint judgment went on to state that ‘judicial independence refers not only to independence from the Executive, it refers to independence from any other source of influence’.²¹⁹ As such, Gummow, Hayne and Crennan JJ suggested that the *Kable* doctrine might (in contrast with the third limb of the incompatibility condition applicable to the *persona designata* exception)²²⁰ be invoked if the character of a court is distorted by virtue of apprehended bias in circumstances which do not involve an association with the other branches of government (albeit with a caveat):

No unthinking translation can be made from the detailed operation of the apprehension of bias principle in particular cases to the separate and distinct question about the institutional integrity of a court. But the apprehension of bias principle is one which reveals the centrality of considerations of both the fact and the appearance of independence and impartiality in identifying whether particular legislative steps distort the character of the court concerned.²²¹

Thus, and although no court (State, territory or federal) has yet taken this step, the joint judgment in *Forge* (building on the judgment in *Bradley*) might be seen as

²¹⁹ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 77 [66] (Gummow, Hayne and Crennan JJ).

²²⁰ See above Chapter 5 nn 108-14.

²²¹ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 77 [66] (Gummow Hayne and Crennan JJ).

authority for the proposition that the *Kable* doctrine transfers the impartiality principles enunciated in *Ebner* to those State and territory courts capable of exercising federal judicial power. This may in turn provide an obstacle to the development of judicial mediation (because the mediation process may, in certain circumstances, give rise to a reasonable apprehension of bias). This possibility is considered in Chapter 8.

Recent case law suggests that the *Kable* doctrine will continue to mark the outer boundaries of State/territory legislative power *vis-à-vis* State/territory courts, but it does not fundamentally extend the circumstances that will enliven it. In *Totani*, a majority of the Supreme Court of South Australia held that s 14(1) of the *Serious and Organised Crime Control Act* (SA) – which authorised the making of a control order preventing a subject from associating with members of a ‘declared authorisation’ – was invalid as it required the Court to ‘act without question on a declaration which represents the finding of the Attorney-General.’²²² Other provisions of the *Control Act* prevented the Court from examining the basis for this declaration in accordance with the fair hearing rule. As such, in Bleby J’s view, s 14(1) constituted an an

unnacceptable grafting of non-judicial powers onto the judicial process in such a way that the outcome is controlled to a significant and unacceptable extent, by an arm of the Executive Government which destroys the court’s integrity as a repository of Federal Jurisdiction.’²²³

As in *Re Criminal Proceeds*, and *Kable* itself, the fatal flaw in 14(1) was that it *entirely* removed the power of the court to conduct proceedings in a judicial manner.

²²² *Totani v South Australia* [2009] SASC 301, [167].

²²³ *Ibid*, [157].

However, and as explained in Chapter 4, procedural discretions (such as would be necessary to implement judicial mediation) will seldom (if ever) be held invalid, because in interpreting those discretions the courts will, wherever possible, assume that ‘Parliament did not intend to pass beyond constitutional bounds.’²²⁴ Thus, in *Forge*, even if the number of acting judges appointed under s 37 had been so great as to undermine the institutional integrity of the Supreme Court, the majority would have applied the presumption that the Supreme Court would apply this discretion judicially (as observed in the joint judgment, the exercise of the *Act* proceeded ‘from an unstated premise about what constitutes a “court.”’)²²⁵ Any failure to maintain the constituent features of the Supreme Court would therefore have been deemed to flow not from any unconstitutional exercise of legislative power, but from the wrongful exercise of the discretion granted by s 37.

The following section demonstrates that, by applying the presumption in favour of validity to State and territory legislation,²²⁶ the High Court has effectively rendered the *Kable* doctrine impotent where an element of judicial discretion remains. While it would be wholly inappropriate for the judiciary to interfere with the ‘true expression of the national will,’²²⁷ this approach permits that the minimum requirements of an independent and impartial tribunal may be all but erased by State or territory legislation. Thus, far from leading to any ‘confusion of public business,’²²⁸ the High Court’s ‘timorous refusal to “run” at all with an expansive and generous interpretation

²²⁴ *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153, 180 (Isaacs J). See also *A-G (Victoria) v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J).

²²⁵ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 79 [73] (Gummow Hayne and Crennan JJ).

²²⁶ *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (‘Second BIO Case’) (1926) 38 CLR 153, 180 (Isaacs J).

²²⁷ *Ibid.*

²²⁸ *Ibid.*

of the *Kable* principle²²⁹ has (ironically) ratified the validity of radical legislation that, for all intents and purposes, usurps the exercise of judicial power.²³⁰ Kirby J dissented in all but one of the judgments analysed in the preceding section, and for this reason His Honour's judgments are examined separately.

'Reading Down' Kable

The strength of the presumption in favour of legislative validity is illustrated in each of the unsuccessful attempts to apply *Kable*, discussed above. In *Fardon*, the High Court considered a legislative scheme similar to that invalidated in *Kable*.²³¹ Part 2, Div 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) provided that the Supreme Court of Queensland could order the continued and indefinite detention of persons convicted of serious sexual offences. The appellant (the subject of a continued detention order) argued that this function was incompatible with the institutional integrity of the Court. By a majority of six to one²³² (Kirby J dissenting), the High Court rejected the appeal. For reasons substantially reflected in the other

²²⁹ Oscar Roos, '*Baker v The Queen & Fardon v Attorney General for the State of Queensland*' (2005) 10(1) *Deakin Law Review* 271, 279.

²³⁰ This is especially alarming in a punitive context. As Patrick Keyzer explains, to 'allow legislatures to imprison people without the predicate commission of a fresh crime and without a criminal trial breaks the nexus between crime and punishment that is part of the fundamental logic of our system of law. The function of punishment is to communicate the censure an offender deserves for his or her *past* crime. One is not punished *in advance*, except where the rule of law, as we have always known it, does not apply. The focus of judicial power on past events is not accidental. Judicial power is characterised by the application of the law to past events or conduct. But in *Fardon v Attorney-General (Qld)* the High Court effectively overruled *Kable*, and decided by majority that State parliaments *can* validly enact legislation that enables a court to re-incarcerate a prisoner after their sentence of imprisonment has ended, in circumstances where the prisoner has committed no new crime, and after a hearing that bears no real resemblance to a criminal trial'. "Preserving Due Process of Warehousing the Undesirables": To What End the Separation of Judicial Power of the Commonwealth?', above n 29.

²³¹ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575.

²³² Gleeson CJ, McHugh, Gummow, Hayne Callinan and Heydon JJ.

majority judgments,²³³ Gleeson CJ distinguished the legislative scheme from the scheme considered in *Kable*:

The Act is a general law authorising the preventive detention of a prisoner in the interests of community protection. It authorises and empowers the Supreme Court to act in a manner which is consistent with its judicial character. It does not confer functions which are incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power. It confers a substantial discretion as to whether an order should be made, and if so, the type of order. If an order is made, it might involve either detention or release under supervision. The onus of proof is on the Attorney-General. The rules of evidence apply. The discretion is to be exercised by reference to the criterion of serious danger to the community. The Court is obliged, by s 13(4) of the Act, to have regard to a list of matters that are all relevant to that criterion. There is a right of appeal. Hearings are conducted in public, and in accordance with the ordinary judicial process. There is nothing to suggest that the Supreme Court is to act as a mere instrument of government policy. The outcome of each case is to be determined on its merits.²³⁴

In short, the majority held that Part 2, Div 3 of the *Act* was not incompatible with the exercise of federal judicial power because it could be interpreted in a manner

²³³ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575. According to Gummow J, at 614 [90], and 615 [93], ‘the nature of the process for which the Act provides assumes particular importance. This process may ameliorate what otherwise would be the sapping of the institutional integrity of the Supreme Court ...[t]here is nothing in the Act to exclude rules of natural justice from the process of the Supreme Court’. Callinan and Heydon JJ, at 658 [234], concluded that the *Act* was ‘designed to achieve a legitimate, preventative, non-punitive purpose in the public interest, and to achieve it with due regard to a full and conventional judicial process, including unfettered appellate review’. McHugh J did not adopt this approach. In His Honour’s view, at 601 [42], the ‘pejorative phrase – “repugnant to the judicial process” – is not the constitutional criterion. In this area of constitutional discourse, it is best avoided, for it invites error. That which judges regard as repugnant to the judicial process may be no more than a reflection of their personal dislike of legislation that they think unjustifiably affects long recognised rights, freedoms and judicial procedures’.

²³⁴ *Ibid*, 592 [19].

consistent with the judicial process. Moreover, Part 2, Div 3 did not bring into question the independence of Supreme Court from the Queensland government. In Gummow J's opinion, 'the reputation of the judicial branch of government ... [was not] borrowed by the legislative and executive branches "to cloak their work in the neutral colors of judicial action."'”²³⁵ As such, it did not undermine the integrity of the Supreme Court or, by virtue thereof, the institutional integrity of the Australian judiciary.

Similar reasoning was applied by the majority in *Baker*. Allan Baker was convicted in 1974 with his co-accused (Kevin Crump) for murder and conspiracy to murder and sentenced to life imprisonment. In sentencing Mr Baker and Mr Crump, Taylor J, stated that 'I believe that you should spend the rest of your lives in gaol and there you should die. If ever there was a case where life imprisonment should mean what it says — the imprisonment for the whole of your lives — this is it'.²³⁶ In 1989, Legislative changes to the parole system in NSW permitted prisoners sentenced prior to the 1989 *Act* to apply to the NSW Supreme Court for a review and determination of their sentence in line with the new system (allowing persons imprisoned for life to seek a minimum term order). Mr Crump so applied and was successful, prompting the NSW government to amend the legislation prior to Mr Baker's application. The *Sentencing Legislation Further Amendment Act 1997* (NSW) amended the *Sentencing Act 1989* (NSW), and S 13A(3A) of the revised *Act* provided that:

A person who is the subject of a non-release recommendation is not eligible
for the determination of a minimum term and an additional term under this

²³⁵ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 615 [91], citing *Mistretta v United States* 488 US 361, 407 (1989).

²³⁶ *Baker v The Queen* (2004) 223 CLR 513, 527 [26].

section, unless the Supreme Court, when considering the person's application under this section, is satisfied that special reasons exist that justify making the determination.

Item 1 of Schedule 1 defined a non-release recommendation as a ‘recommendation or observation, or an expression of opinion, by the original sentencing court that (or to the effect that) the person should never be released from imprisonment’. Thus, by virtue of Taylor J’s remarks at sentencing, Mr Baker fell within the remit of s 13A(3A). Mr Baker argued that s 13A(3A) was in effect *ad hominem* in nature, as there were only ten persons (including himself) subject to such a recommendation. Moreover, and in accordance with *Kable*, he argued that the criterion by which the discretion vested by s 13A(3A) was to be determined (‘special reasons’) was incapable of judicial application, and was therefore incompatible with its role as a repository of federal judicial power. The High Court rejected the appeal. Callinan J held that there was ‘real content’²³⁷ in this criterion, and Gleeson CJ found that:

There is nothing unusual about legislation that requires courts to find “special reasons” or “special circumstances” as a condition of the exercise of a power. This is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition²³⁸

²³⁷ *Baker v The Queen* (2004) 223 CLR 513, 574 [177].

²³⁸ *Ibid* 523 [13].

McHugh, Gummow, Hayne and Heydon JJ flatly rejected the appellant's contention that the legislation was, in effect, *ad hominem* in nature,²³⁹ and agreed with Gleeson CJ and Callinan J that the word 'special'

is a qualification to which meaning not only can, but must, be given in the context of the facts advanced in any particular case as warranting the description "special reasons". The fact that reasons identified as "special" may (indeed almost certainly would) be relevant to the exercise of the power of determination does not strip the expression "special reasons" of meaning.²⁴⁰

Moreover, and unlike s 5(1) of the *Community Protection Act* struck down in *Kable*, the majority did not consider that s 13(3A) brought the Supreme Court within too close a relationship with the executive or legislature.²⁴¹

It is necessary to point out that, although the term 'special reasons' ostensibly vests a broad discretionary power in the Supreme Court, the effect of s 13A(3A) is in fact to place a condition upon the Supreme Court's ability to exercise judicial power. Only if 'special reasons' exist may the Court issue a minimum term order. Thus, while there is no question that s 13(3A) amounts to a legislative 'usurpation' or 'direction',²⁴² it does amount, in effect, to an interference with the exercise of judicial power. This was the basis of Kirby J's dissenting judgment, considered in the following section.

²³⁹ *Baker v The Queen* (2004) 223 CLR 513, 534 [50].

²⁴⁰ *Ibid* 532 [41].

²⁴¹ *Ibid* 532 [42].

²⁴² This is in direct contrast with the view of Kirby J (discussed in more detail below): *Baker v The Queen* (2004) 223 CLR 513, 547 [94]-[95].

The presumption in favour of legislative validity was applied again in *Gypsy Jokers Motorcycle Club v Commissioner for Police* ('Gypsy Jokers').²⁴³ *Gypsy Jokers* concerned Pt 4, Div 6 of the *Corruption and Crime Commission Act 2003* (WA). The *Act* provided the Commissioner of Police with the power in certain circumstances to issue 'fortification warning notices' (requiring the removal of devices preventing lawful access to premises by law enforcement), and limited the power of the Supreme Court of Western Australia to review the Commissioner's exercise of that power. The appellants argued that s 76(2) of the *Act* was invalid as it vested in the Supreme Court of Western Australia a function repugnant to the judicial process and, thus, institutional integrity. Section 76(2) of the *Act* provided that, on review by the Supreme Court, the Commissioner of Police could identify as confidential certain information that would ordinarily be disclosed to the applicant.

The appellants contended that s 76(2) denied them procedural fairness as it compromised the Supreme Court's ability to ascertain the facts, provide proper reasons for its judgments, or otherwise conduct proceedings in accordance with its requirements as a Ch III court.²⁴⁴ By removing the Supreme Court's discretion in these matters, the appellants also argued that the Commissioner was effectively directing the exercise of judicial power. By a majority of five to one, the High Court dismissed the appeal. Gummow, Hayne, Heydon and Kiefel JJ stated that:

As a general proposition, it may be accepted that legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts

²⁴³ *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532.

²⁴⁴ *Ibid*, 592 [166] (Crennan J).

as independent and impartial tribunals. However, as indicated by the result in *Nicholas v The Queen*, upholding the validity of s 15x of the *Crimes Act 1914* (Cth), there is no impermissible interference with the exercise of judicial power even by such a significant evidentiary provision displacing the common law formulated in *Ridgeway v The Queen*.²⁴⁵

Their Honour's concluded that s 76(2)

should not be read as an attempted legislative direction as to the manner of the outcome of any review application made under s 76. The words are no more than an attempt at exhortation and an effort to focus attention by the Court to the prejudicial effect disclosure may have.²⁴⁶

One final case confirms that the High Court's application of the presumption in favour of legislative validity has all but erased the incompatibility component of the *Kable* doctrine. *K-Generation Pty Ltd v Liquor Licensing Court* ('*K-Generation*')²⁴⁷ is also significant in that it is the first and only occasion upon which the High Court has considered *Kable* vis-à-vis a non-criminal function. The appellants (applicants for a liquor license) submitted that s 28A of the *Liquor Licensing Act 1997* (SA) was invalid as it required the Liquor Licensing Court to accept in evidence 'criminal intelligence' tendered by the Commissioner of Police without disclosing that information to the applicants. Section 28A (5)(a) of the *Act* provided that the Court

²⁴⁵ *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532, 560 [39].

²⁴⁶ *Ibid* 561 [44].

²⁴⁷ (2009) 252 ALR 471.

must, on the application of the Commissioner of Police, take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives.

The applicants contended that this provision undermined the principles of open justice (by requiring proceedings to be held in private) and required the court to conduct itself in a manner contrary to procedural fairness (by considering evidence in the absence of one of the parties). The High Court unanimously rejected the appeal. Having found that the *Kable* doctrine applied to the Liquor Licensing Court (as explained above), the Full Bench held that s 28A was nevertheless a valid exercise of State legislative power. In a joint judgment, Gummow, Hayne, Heydon, Crennan and Kiefel JJ, held that s 28A, ‘properly construed’, neither removed from the court the power to reject the Commissioner’s classification,²⁴⁸ nor obliged the court to hear arguments in private to the exclusion of the applicants. Rather, s 28A marked ‘out the limits of the range within which the Licensing Court may act in particular cases when determining how to maintain the confidentiality of the information.’²⁴⁹ French CJ agreed, noting that the ‘constructional choice [adopted] applies the presumption in favour of legislative validity consistent with the principle of legality’:

Section 28A infringes upon the open justice principle that is an essential part of the functioning of courts in Australia. It also infringes upon procedural fairness to the extent that it authorises and effectively requires the Licensing Court and the Supreme Court to consider, without disclosure to the party to

²⁴⁸ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471, 500 [144].

²⁴⁹ *Ibid* 500 [147].

whom it relates, criminal intelligence information submitted to the Court by the Commissioner of Police. However, it cannot be said that the section confers upon the Licensing Court or the Supreme Court functions which are incompatible with their institutional integrity as courts of the States or with their constitutional roles as repositories of federal jurisdiction. Properly construed the section leaves it to the courts to determine whether information classified as criminal intelligence answers that description. It also leaves it to the courts to decide what steps may be necessary to preserve the confidentiality of such material. The courts may, consistently with the section, disclose the material to legal representatives of the party affected on conditions of confidentiality enforced by undertaking or order. It leaves it open to the courts to decide whether to accept or reject such material and to decide what if any weight shall be placed upon it.²⁵⁰

Even Kirby J was unwilling to find that s 28A vested an incompatible function in the Licensing Court. His Honour drew a distinction between the quasi-directive legislation of the kind passed in *Gypsy Jokers*, and the ‘more facultative’ provisions of the *Liquor Licensing Act*.²⁵¹ He concluded that:

[T]he provisions of s 28A(5) of the Act, properly construed, do not offend the Kable principle. As was intended, the provision diminishes the role of a court to decide claims to privilege with respect to “criminal intelligence”. However, it does not involve the State Parliament or the Police Commissioner impermissibly “instructing” a court on a particular case. It does not prevent a court from performing traditional judicial functions. It does not diminish the

²⁵⁰ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471, 486 [73].

²⁵¹ *Ibid* 531 [257].

integrity and independence of a court in a constitutionally impermissible way.²⁵²

Given that all but one member of the High Court has consistently applied a presumption in favour of legislative validity, it seems reasonable to conclude that *Kable* will rarely if ever result in an Act or provision being struck down. Even if a provision ‘effectively requires’ a court to disregard the principles of open justice and procedural fairness, it will be valid provided that it does not explicitly remove that court’s discretion to disregard that ‘effective requirement’ when the circumstances of the case demand it. Neither the object of the legislation nor the effect of cumulative provisions will have any bearing upon this enquiry, nor will it be relevant how narrow the remaining discretion is (indeed, it may be ‘effectively’ non-existent).

The High Court’s attachment to this interpretive approach ‘bodes well’ for judicial mediation, but is the application of this approach consistent with the object of Ch III in respect of legislation that, in pith and substance, directs the exercise of judicial power? Could not a different interpretive approach be adopted in respect of legislation that removes or limits the discretionary power of judges (securing a specific governmental agenda), on the one hand, and legislation that increases the procedural discretionary power of judges (facilitating the provision of novel judicial procedures), on the other?

²⁵² *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471, 531-32 [258].

Justice Kirby's approach: 'The character of the Law'

In *Fardon*, Kirby J disagreed with the majority that Part 2, Div 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was valid. His Honour lamented the failure of the High Court to take up the opportunity presented by *Kable*,²⁵³ and explained that:

Kable is especially important when the rights of unpopular minorities are committed to the courts. That is when legislatures may be tempted to exceed their constitutional powers, involving the independent judiciary in incompatible activities so as to cloak serious injustices with the semblance of judicial propriety. Against such risks, Ch III of the *Constitution* stands guard. This Court should be vigilant to uphold such protection. That is what the principle in *Kable* requires.²⁵⁴

Rather than adhere to traditional techniques of interpretation, Kirby J advocated an approach which places a 'heavy burden of persuasion'²⁵⁵ on legislatures, and which takes account of an act's 'cumulative effect'.²⁵⁶ In such matters, His Honour explained, 'attention is addressed to actuality, not appearances. Were it otherwise, by the mere choice of legislative language and the stroke of a pen, the requirements of the *Constitution* could be circumvented'.²⁵⁷ Ultimately, His Honour explained, it is a question of 'the character of a law'.²⁵⁸ And:

²⁵³ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 626 [134]-[135].

²⁵⁴ *Ibid* 626 [135].

²⁵⁵ *Ibid* 630 [144].

²⁵⁶ *Ibid* 632 [149]. In this respect Kirby J's approach has flavours of the High Court's integrated approach to s 122 of the *Constitution* (discussed above); which views the 'Constitutional as a whole'. Kristen Walker has identified similar concerns. 'Persona Designata, Incompatibility and the Separation of Powers' (1997) 8 *Public Law Review* 153, 163-64.

²⁵⁷ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 634-35 [157].

²⁵⁸ *Ibid* 635 [159].

Despite the attempts in the Act to dress up the jurisdiction and powers given to the Supreme Court of Queensland as a measure for the protection of the public, a close analysis of its features confirms the impression which is derived, at the threshold, from its short title. This is an Act to make provision for the continuous punishment of prisoners who have already served punishment previously imposed upon them by the judiciary for specified sexual offences.²⁵⁹

Kirby J applied similar reasoning in *Baker* to find s 13(3A) of the *Sentencing Act 1989* (NSW) invalid. In His Honour's view, the Act was, in effect, *ad hominem* in nature,²⁶⁰ and was to be determined by 'arbitrary and discriminatory criterion'.²⁶¹ Kirby J also considered that the Act sanctioned retroactive punishment,²⁶² undermined basic human rights,²⁶³ and (in effect) usurped judicial power²⁶⁴ (the Parliamentary debates clearly indicated that the Act was intended to operate as a bill of attainder, in object if not in form).²⁶⁵ As a matter of principle, His Honour opined:

A constitutional rule ... requires a court to look at the legislation impugned from the standpoint of substance, not mere form. Being a constitutional doctrine, the rule in *Kable* requires the measurement of the challenged legislation as it could operate in fact; not a narrow approach befitting consideration of the validity of regulations made under a *Dog Act*.²⁶⁶

²⁵⁹ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 631 [147].

²⁶⁰ *Baker v The Queen* (2004) 223 CLR 513, 547 [94]-[95].

²⁶¹ *Ibid* 552-54 [112]-[119].

²⁶² *Ibid* 548 [100].

²⁶³ *Ibid* 558-60 [133]-[140].

²⁶⁴ *Ibid* 548-49 [101].

²⁶⁵ *Ibid* 535-39 [59]-[66].

²⁶⁶ *Ibid* 536 [56].

In *Gypsy Jokers*, Kirby J again expressed concern that the *Kable* doctrine was being construed too narrowly.²⁶⁷ His Honour also refuted the suggestion (adopted by the Supreme Court of Western Australia), that the ultimate question was whether the

impugned legislation rendered the Supreme Court “no longer a court of the kind contemplated by Ch III.” If that were indeed the criterion to be applied, it would be rare, if ever, that constitutional incompatibility could be shown.

Kable's constitutional toothlessness would then be revealed for all to see.²⁶⁸

Kirby J accepted the ‘purpose of adopting’ a presumption in favour of validity,²⁶⁹ but acknowledged Fiona Wheeler’s observation that the “‘the [*Kable*] principle may be operating prophylactically;”²⁷⁰ suggesting that, one ‘manifestation of this could be the reading down of State legislation so as to avoid inconsistency with the *Kable* principle’.²⁷¹ Finding it impossible, in any event, to construe the provision in favour of validity, Kirby J concluded that

the sub-section involves an impermissible legislative direction to the Supreme Court. Effectively, it imposes the decision of an officer of the Executive Government upon the Supreme Court. That officer, in law or in

²⁶⁷ *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532.

²⁶⁸ *Ibid* 578 [105]. His Honour went to on to explain, at 578 [105]-[106], that the ‘fact is that, whatever the outcome of this case, the Supreme Court would continue to discharge its regular functions. Overwhelmingly, it would do so as the Constitution requires. A particular provision, such as s 76 of the *Act*, will rarely be such as to poison the entire character and performance by a Supreme Court of its constitutional mandate as such or alone to result in a complete re-characterisation of the Court. Adoption of such an approach would, in effect, define the *Kable* doctrine out of existence. This should not be done. *Kable* recognised an important principle arising from the unique features of the Judicature of Australia. Such features necessitate vigilant protection of the State courts and their processes’.

²⁶⁹ *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532, 575 [95].

²⁷⁰ *Ibid* 572 [84]; citing Wheeler, ‘The *Kable* Doctrine and State Legislative Power over State Courts’, above n 128.

²⁷¹ *Ibid* 572 [84].

substance, thereby controls the discharge of the judicial process, the effective participation of the Supreme Court in that process and the capacity of the Supreme Court to explain the reasons for its decision to the parties and the public. The judge may appear in robes to pronounce what shall be done. But the hand that directs the process is elsewhere, outside the courtroom, and actually belongs to the respondent party.²⁷²

In contrast (as discussed above), Kirby J did not find it necessary to avoid the presumption in favour of legislative validity applied by the majority in *K-Generation*. In that instance, His Honour held that s 28A of the *Liquor Licensing Act 1997* (SA) was valid, as in his view it was neither directive in nature nor incompatible with the judicial process.²⁷³ It is submitted that in reality, however, the difference between *K-Generation* and cases such as *Kable*, *Baker*, *Fardon* and *Gypsy Joker's* is merely one of fact and degree.²⁷⁴ The jurisdiction in *K-Generation* was regulatory in nature. Section 28A did not affect the court's power to ensure fairness in criminal matters, where 'the guarantee involved in the vesting of judicial power ... is at its most important'.²⁷⁵ Nor was *K-Generation* a case in which 'the rights of unpopular minorities' were concerned,²⁷⁶ or in which Parliament sought to undermine basic human rights.²⁷⁷ Perhaps more importantly, s 28A was not supported by an overriding objective indicating Parliament's intention to secure a particular outcome in individual cases. Thus, looking 'at the legislation impugned from the standpoint of

²⁷² *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532, 563 [52].

²⁷³ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471, 531-32 [258].

²⁷⁴ Fiona Wheeler previously made this observation relation to the differences between *Kable* and *Fardon*, which; 'highlights the subtle distinctions that the Gleeson Court is inclined to drawn in its constitutional reasoning'. 'The Kable Doctrine and State Legislative Power over State Courts', above n 128, 25.

²⁷⁵ *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 581 (Deane J).

²⁷⁶ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 626 [135].

²⁷⁷ *Baker v The Queen* (2004) 223 CLR 513, 558-60 [133]-[140].

substance’²⁷⁸ s 28A did not amount to an ‘impermissible legislative direction’ in the exercise of judicial power.²⁷⁹ In the circumstances, the remaining discretion was sufficient to ensure the fairness of proceedings.

Conclusion

This Chapter has attempted to traverse the constitutional principles which limit the power of State and territory legislatures to affect the judicial process in State and territory courts. It has also attempted to breathe life into these principles by framing them within their broader jurisprudential context. Four conclusions emerge from this analysis, which are of particular relevance to this thesis.²⁸⁰

First of all, the *Kable* doctrine has never been applied successfully in respect of a purely civil function. Indeed, on only one occasion has *Kable* even been considered in this context.²⁸¹ Of course, the opportunity remains for the High Court to expand the incompatibility component of *Kable* so as to limit the development of novel civil procedures. However, ‘the guarantee involved in the vesting of judicial power’ is generally considered more important in criminal matters,²⁸² and even Kirby J was unwilling to find incompatibility in a civil context where individual liberties were not a factor.²⁸³ To the current writer’s knowledge, the only Australian court to have considered procedures that are in any way comparable to judicial mediation has been the Family Court vis-à-vis the LAT Process, and that Court has twice found those procedures to be valid by applying the same principles of statutory interpretation as

²⁷⁸ *Baker v The Queen* (2004) 223 CLR 513, 536 [56].

²⁷⁹ *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532, 563 [52].

²⁸⁰ Judicial mediation is examined in light of these factors in Chapter 8, below nn 188-214.

²⁸¹ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471

²⁸² *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 581 (Deane J).

²⁸³ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471, 531-32 [258].

the High Court.²⁸⁴ Since the incompatibility doctrine theoretically permits the vesting of a wider array of non-judicial functions than the separation doctrine, the *Kable* doctrine is even less likely to impede the development of similar procedures in the States and territories.

Second of all, even if a function is notionally incompatible with institutional integrity, State or territory parliaments can simply draft legislation in a manner capable of being read down in accordance with the presumption in favour of legislative validity. Despite Kirby J's often strident objections, *Bradley*, *Baker*, *Fardon*, *Forge*, *Gypsy Jokers* and *K-Generation* demonstrate that State or territory legislation that vests in courts functions that undermine the capacity of a court to ensure fairness in proceedings 'will seldom, if ever, compromise the institutional integrity of the court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law'.²⁸⁵ Applying the presumption in favour of legislative validity it is almost inconceivable that State or territory legislation which purports to *increase* the discretionary power of a court (as would be necessary to implement judicial mediation) would ever be held invalid under the *Kable* doctrine. This will be so even if legislation encompasses an overriding object that 'essentially required' courts to abandon the adversarial process.

Nevertheless, and for the reasons assayed in the preceding section, it would seem preferable to apply an interpretive approach that is sensitive to the differences between legislation that increases the procedural discretionary power of judges, on the one hand, and legislation that removes or impedes it, on the other. A clear distinction

²⁸⁴ *Truman v Truman* (2008) 216 FLR 365; *Crestin v Crestin* (2008) 39 Fam LR 420.

²⁸⁵ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 601 [41] (McHugh J).

in this area would allow the controlled development of novel judicial functions (such as judicial mediation), whilst prohibiting the governmental hijacking of judicial proceedings. However, Kirby J's repeated calls to adopt an interpretive mechanism which takes account of substance as well as form have gone unheeded, and it seems likely that this approach will join His Honour in retirement. This point is reconsidered in the concluding Chapter to this thesis.

Thirdly, and despite early indications, the authorities suggest that it may never truly have been intention of the High Court to engage in the detailed policing of the functions vested in State or territory courts. *Kable* proceeds from the recognition that State Courts may affect the integrity of the federal judiciary. It does not entrench any particular view as to how State courts should operate (or how they should be constituted). Indeed, the High Court's continued refusal to provide any general criteria of incompatibility and its superficial reliance on the presumption in favour of legislative validity make more sense if *Kable* is itself reconceptualised as a component part of a broader integration principle. This broader principle has two objects; to limit Parliament's legislative power vis-à-vis the territories, and to secure the effectiveness of the High Court's appellate jurisdiction. *Kable* serves the latter of these objects by asserting the power to strike down legislation affecting the judicial process in Ch III courts (and by extension other State courts). The *Spratt* stream serves the same object by bringing territory courts within Ch III. These streams were connected in *Bradley* and *Baker*, at which point the collective object was realised. Of course, the importance of High Court's role would be reinforced if it *did* actually apply and/or expand the incompatibility component of *Kable* (especially in relation to

effective usurpations of judicial power), but this is not essential to the ultimate object of integration; what is essential is the possibility that the High Court *may* apply *Kable*.

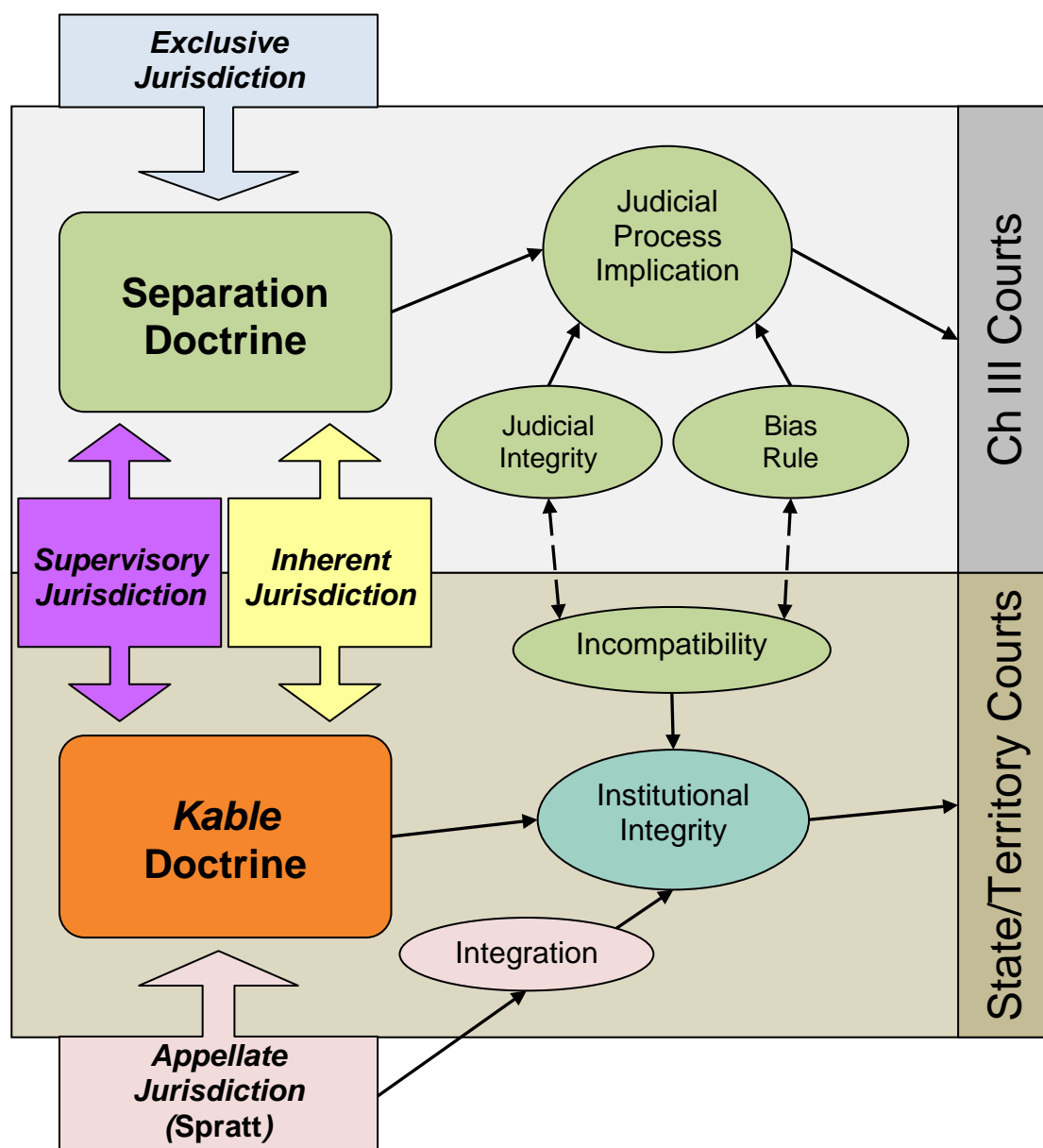
Finally, even if, as seems likely, the *Kable* doctrine permits the vesting of mediation functions in State or territory courts, this does not mean that State or territory courts can necessarily mediate. It simply means that a legislative discretion facilitating judicial mediation is unlikely to be held invalid by virtue of the *Kable* doctrine. As with Ch III courts what is important (and what will ultimately shape judicial mediation in practice) is how that discretion is exercised, and which practices appellate courts consider to be within the boundaries of acceptable judicial conduct. This question is the subject of the following two Chapters.

Summary of findings: federal, State and territory

The object of Chapters 2 through 6 has been to unpack the requirements of Ch III, in order to determine whether, or to what extent, the Constitution imposes limits upon, or liberates opportunities for, judicial mediation. These Chapters have isolated a number of implications of relevance to the development of judicial mediation in Ch III, State and territory Courts.²⁸⁶ The relationship between these implications, and the constitutional imperatives (or essential jurisdictions) which inform them, can be expressed diagrammatically as follows:

²⁸⁶ In Chapter 1, judicial mediation was defined as ‘a prehearing process in which an active judge (the “judicial-mediator”) attempts to guide opposing parties towards an outcome to which they can both assent. The judicial mediation process takes place as part of the formal court process, but does not involve the provision of a binding determination by the judicial-mediator’. In Chapter 4 it was explained that the fair hearing rule is unlikely to affect judicial mediation as it simply requires that parties be given the opportunity to make submissions and to cross-examine witnesses; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), and that judicial mediation will not affect this right. It was also explained that the ‘demands of open justice apply only to the hearing proper’. Joseph Jaconelli, *Open Justice: A critique of the open trial* (2002) 65.

Figure 1: Applicable Ch III Implications



The broken arrows connecting the judicial process implication with the incompatibility component of the *Kable* doctrine are intended to reflect the fact that the relationship between these concepts remains uncertain.

While the High Court has frequently justified the implications reflected in *Figure 1* by recourse to the separation of powers doctrine, and in particular the need to ensure the independence of the judiciary because of the role of the High Court in interpreting the Constitution, the preceding Chapters demonstrate that it is, ultimately, the need to maintain judicial impartiality that lies at the heart of Ch III. Impartiality is the life-blood of the judicial process implication, the *Kable* doctrine, and the incompatibility condition applied to *persona designata* appointments. It is this requirement which necessitates the constitutional protection of exclusive, inherent, appellate and supervisory jurisdiction. This conclusion tallies with what Martin Shapiro has described as the ‘logic of the triad’:

The root concept employed here is a simple one of conflict structured in triads. Cutting across cultural lines, it appears that whenever two people come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance ... A substantial portion of the total behaviour of courts in all societies can be analyzed in terms of attempts to prevent the triad from breaking down into two against one.²⁸⁷

With more specific reference to Australian jurisprudence, Stephen Parker draws upon Martin Shapiro’s model to conclude that:

Judicial independence describes a set of arrangements designed to promote and protect the perception of impartial adjudication. The arrangements will differ according to the age and the society, and they may be more or less

²⁸⁷ Martin Shapiro, *Courts: A Comparative and political analysis* (1986) 1-2.

effective in achieving the ends to which they are directed. The core concept with which we should be concerned, however, is perceived impartial adjudication. Judicial independence is only a derivative concept which describes the conditions designed to preserve such adjudication.²⁸⁸

It follows that the question whether judges can mediate is, in the final analysis, an enquiry into whether judicial mediation can be carried out impartially. This overarching question is the focus of the following two Chapters.

²⁸⁸ Stephen Parker, 'The Independence of the Judiciary', in Brian Opeskin and Fiona Wheeler (eds) *The Australian Federal Judicial System* (2000), 71.

CHAPTER 7

MEDIATION AND ADJUDICATION: A PROCEDURAL CONTINUUM

Two key points emerge from the preceding Chapters. The first point is that the High Court has consistently read down legislative provisions affecting judicial procedures in favour of validity, and that, applying this approach, statutory provisions or rules of court will only be held invalid if they explicitly and unambiguously require a court to proceed in a non-judicial manner.¹ As a result of this approach, the *Kable* doctrine has been all but erased as a limitation on the functions that may be vested in State or territory courts. The second point is that the implications drawn from Ch III may limit the development of judicial mediation in Australian courts, but that they will only do so to the extent that judicial mediation activates the rule against bias, or undermines the requirements of judicial integrity as they apply in a federal or State/territory context.² These requirements flow from the need to maintain judicial impartiality.

It follows that, regardless of jurisdiction, two questions must be asked in order to determine whether (or to what extent) judicial mediation can be implemented in accordance with Ch III. The first question is how, precisely, the power to mediate is, or will be, transmitted to courts. (Will the relevant provision/s be introduced by statute or in the form of court rules? Will those provisions yield a specific mediation process, or will this be left to the discretion of individual judges?). The second question is whether, in light of the answer to the first question, judicial mediation can

¹ See above Chapter 4 nn 212-47, Chapter 6 nn 220-46, and accompanying text.

² See above Chapter 4 nn 50-146, 187-209, Chapter 6 nn 169-217, and accompanying text.

be exercised in a manner consistent with the rule against bias and the requirements of judicial integrity. The answers to these questions will not at once determine whether judicial mediation complies with the requirements of Ch III (because the Constitution controls what judges can do, not vice versa) but the implications drawn from Ch III must be interpreted in light of judicial practice or we risk isolating Ch III jurisprudence ‘completely from the social context within which it exists’.³

This Chapter lays the theoretical foundations necessary to answer these questions. The Chapter begins by demonstrating that the Australian judicial role has undergone a transformation in recent years, and that it is no longer realistic (assuming that it ever was) to define what courts and judges ‘do’ by reference to static notions of the traditional judicial process. This proposition is developed by returning to the ‘wave’ model developed by Mauro Cappelletti and Bryant Garth (outlined in Chapter 1), and by appraising two overlapping trends which flow from the access to justice movement: the integration of ADR and the formal justice system; and the increase in judicial control of the civil trial process.⁴ Building on these theoretical foundations it is submitted that mediation and adjudication represent theoretical archetypes at opposing ends of the same procedural spectrum, with the reality of both lying somewhere in between. On this basis, it is argued that the question is not whether judicial mediation ‘will’ result in apprehended bias or undermine judicial or institutional integrity, but how far towards the mediation end of the procedural spectrum judicial conduct can travel before the rule against bias is activated or judicial integrity is undermined.

³ Judith N Shklar, *Legalism: Law, Morals and Political Trials* (1964), 2. This extract was not directed at Ch III, but the point expressed is equally applicable in the current context. This point is examined in more detail below, nn 262-69.

⁴ Tania Sourdin, ‘Judicial Management and Alternative Dispute Resolution Process Trends’ (1996) 14 *Australian Bar Review* 185, 185.

In the course of this analysis the likely form and structure of judicial mediation is also anticipated by reference to various third-wave reforms, which (to continue the metaphor) represent the crest of the third-wave in Australia. A comparative analysis of these reforms serves to contextualise how judicial mediation does and/or will operate in practice, and further demonstrates that formal definitions can be of limited utility as a means of distinguishing between seemingly disparate dispute resolution processes.

One final point should be stressed. Frequent reference is made throughout this Chapter to the practices and procedures adopted in overseas legal systems; most notably the US. These references are not intended to uncover fresh constitutional perspectives, or to ground a detailed comparative study of court-connected ADR and civil justice trends in the jurisdictions identified. Rather, general comparisons are made with these legal systems in order demonstrate general and multi-jurisdictional trends in civil justice, *irrespective* of the constitutional principles controlling those trends. In addition, the theoretical approach adopted in this Chapter to the relationship between mediation and adjudication is rooted in American theory, and specific reference is therefore made to US judicial practice on this basis. Again, however, these references should not be interpreted as an attempt to import and apply the substantive findings of overseas research in an Australian context.

The Integration of ADR and the Formal Justice System

Earlier it was noted that common law countries have accommodated ADR mechanisms at the periphery of the formal court system for years (notably through the

regulation of arbitration).⁵ It was also pointed out that the taxonomy of ADR processes is imprecise,⁶ and that various methodological approaches have been adopted in an attempt to delineate between dispute resolution models.⁷ One of the approaches identified involves classifying processes according to whether they are facilitative, evaluative or determinative in nature.⁸ Although in practice models will frequently exhibit features from more than one category, this approach provides a useful framework for analysis.

The ‘alternative’ quality attributed to ADR reflects an early tendency to define ADR processes ‘in contradistinction – sometimes in opposition to – litigation and the formal justice system’.⁹ To an extent this tendency persists, and ADR mechanisms are commonly employed as a result of perceived deficiencies in formal litigation; the objectives being, inter alia, reduced costs, speedier resolutions, increased disputant satisfaction, community cohesion, relationship transformation, and accessibility.¹⁰ In reality, however, it has probably always been inaccurate to classify ADR processes as alternatives to adjudication.¹¹ This is partly because adjudication ‘has always been an exceptional way of dealing with disputes’¹² (as illustrated in Chapter 1), and partly because, in practice, courts and/or judges will often engage in processes commonly

⁵ See above Chapter 2 nn 51-76 and accompanying text.

⁶ Laurence Boulle, *Mediation: Principles Process Practice* (2005), 4-6; Hillary Astor and Christine Chinkin, *Dispute Resolution in Australia*, (2nd ed, 2002), 135; Tania Sourdin, *Alternative Dispute Resolution* (2005), 26; David Spencer and Michael Brogan, *Mediation Law and Practice* (2006), 4.

⁷ See above Chapter 1 nn 5-21 and accompanying text.

⁸ National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (AGPS, Canberra, September 2003), 4.

⁹ Astor and Chinkin, above n 6, 3-6.

¹⁰ Boulle, above n 6, 69-74. See above Chapter 1 nn 69-99.

¹¹ Boulle, above n 6, 139. ADR proponents have sought to redefine the ADR acronym as ‘assisted’ or ‘additional’ dispute resolution. The ‘alternative’ designation has now ‘passed so firmly into common parlance’, however, that these efforts have been largely ineffective (Astor and Chinkin, above n 6, (n. 1)).

¹² Boulle, above n 6, 139. See also David Weisbrot, ‘Reform of the Civil Justice System and Economic Growth: Australian Experience’ (2003) 6 *Flinders Journal of Law Reform* 235, 245; Victorian Law Reform Commission, *Civil Justice Reform: Report*, Report No 98 (2008) [6.53].

associated with these supposed alternatives. The latter proposition is exemplified by the development of court-connected and court-integrated ADR.¹³

Court-Connected ADR

The origins of modern ADR in ‘western industrialised societies’ are often traced to the development of neighbourhood justice centres in the early late 1960’s and early 1970’s,¹⁴ but the proliferation of court-connected ADR (in the sense referred to here)¹⁵ began in earnest following the Pound Conference in 1976.¹⁶ In the US, the Federal Court became the first appellate court to introduce court-connected mediation in 1981. The ‘Pre-Argument Conference’ was a confidential mediation service provisioned by ‘staff mediators,’¹⁷ and according to Robert Rack, today ‘every federal circuit court except the Federal Circuit has a mediation program’.¹⁸ In Canada, by way of contrast, it was not until the 1990’s that the provinces of Ontario¹⁹, Alberta²⁰ and Manitoba²¹ introduced procedural amendments requiring parties in certain actions to attend mandatory mediation subsequent to filing. The institutionalisation of

¹³ The term ‘court-connected’ is adopted here as a reference to all ADR services or processes specifically referred to or operated by the courts, and as a sub-category of ‘court-associated’ ADR, which includes all forms of ADR (including private negotiation) associated with the formal court system. Tania Sourdin draws a further distinction between ‘court-connected ADR’ and ‘court-integrated ADR’, the latter of which she defines as an ‘integration strategy...involving judicial and quasi-judicial officers within courts and tribunals using ADR processes to resolve and manage disputes (processes may vary from settlement conferences, mediation or concurrent evidence approaches)’. Tania Sourdin, ‘Facilitative Judging’ (2004) *Law In Context* 64, 66. Court-integrated ADR is considered in the following section, under the heading ‘increased judicial control of the trial process’.

¹⁴ Astor and Chinkin, above n 6, 5; Boule, above n 6, 57 – 59, 287; Judge Dorothy Wright Nelson ‘ADR in the Federal Courts - One Judge's Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public’ (2001) 17(1) *Ohio State Journal on Dispute Resolution* 1, 2.

¹⁵ Above n 13.

¹⁶ Jeffrey Stempel ‘Reflections on Judicial ADR and the Multidoor Courthouse at Twenty: Fait Accompli; Failed Overture, or Fledgling Adulthood’ (1996) 11 *Ohio State Journal on Dispute Resolution* 297, 309; Wright Nelson, above n 14, 1.

¹⁷ Robert Rack, ‘Thoughts of a Chief Circuit Mediator on Federal Court-connected Mediation’ (2002) 17 *Ohio State Journal on Dispute Resolution* 609, 609-10.

¹⁸ Ibid 610.

¹⁹ *Ontario Rules of Civil Procedure, RRO 1990*, r 24, Regulation 194.

²⁰ *Mediation Rules of the Provincial Court, Civil Division for Alberta, 1997*.

²¹ *The Queen’s Bench (Mediation) Amendment Act SS 1994 c.9*.

mediation has occurred even more recently in England and Wales, following the introduction of a non-mandatory ADR referral scheme in 1999.²² The English Court of Appeal has since introduced a voluntary court-connected mediation scheme, and similar programs are, or have been, trialled in the Central London, Leeds, Manchester, Reading and Exeter County Courts. Court-connected mediation has also been trialled in Scotland in the Edinburgh Sherriff Court.²³

Compared to Canada and the UK, the expansion of court-connected ADR in Australia is at a relatively advanced stage, and it is not uncommon (unlike court-connected ADR in the UK) for referral to be mandatory.²⁴ Whether mediation can or should ever be mandatory is a complex and contentious issue,²⁵ but as shown in Chapter 8, judicial mediation is unlikely to be mandatory in any event.²⁶ John Wade has described the introduction of court-connected ADR in Australia (and in particular court-connected mediation) as a 'legislative avalanche' that began in the early 1980's with the *Community Justice Centres (Pilot Projects) Act 1980* (NSW), and notes that by 1998, in Queensland alone, there were some 28 Acts or Regulations providing for

²² Following the recommendation of Lord Woolf (Lord Harry Woolf, *Access to Justice: Final Report* (1996)), disputants in England and Wales must now follow pre-action protocols in certain instances, and may face cost orders if they do not. *Civil Procedure Rules 2005* (England and Wales), r 44.3(a). Judges may also encourage parties to attend ADR during a preliminary case management conference (*Civil Procedure Rules 2005* (England and Wales), s 1.4(2)(e)).

²³ Elaine Samuel, *Supporting Court Users: the In-court*, (2002).

²⁴ In NSW, for example, s 26 of the *Civil Procedure Act 2005* provides that if 'it considers the circumstances appropriate, the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned'. See also: *Uniform Civil Procedure Rules 1999* (Qld), rr 323, 334; *Rules of the Supreme Court 1971* (WA), O29A, r 3(2) (j) – (k); *Supreme Court General Civil Procedure Rules 2005* (Vic), s 50.07 (1); *Supreme Court Rules 2000* (Tas), reg 518; *Supreme Court Rules* (NT) s 48.13; *Family Law Rules 2004* (Cth), r 11.01; *Federal Court Rules 1979* (no. 140 as amended) O 10, r 1(2)(a)(xx); *Federal Magistrates Court Rules 2001*, reg 27.01. See, in contrast, *Supreme Court Civil Rules 2006* (SA), r 220, which states that the 'power to appoint a mediator is not to be exercised by a Master without the consent of the parties affected by the proposed mediation'.

²⁵ See for example, Laurence Boulle, above n 6, 23-28; Bobette Wolski, 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1997) 15(3) *Australian Bar Review* 213; Nadja Alexander, 'Mediation on Trial: Ten Verdicts on Court-related ADR', in Tania Sourdin, *Alternative Dispute Resolution and the Courts* (2004), 8; Magdalena McIntosh, 'A step forward – mandatory mediations' (2003) 14 *Australian Dispute Resolution Journal* 280.

²⁶ See below Chapter 8 nn 9-31 and accompanying text.

court-connected ADR (and mediation in particular).²⁷ In 1999, the Council of Chief Justices of Australia and New Zealand adopted the *Declaration of Principles on Court Annexed Mediation*, which states, inter alia, that mediation ‘is an integral part of the courts adjudicative processes and the ‘shadow of the court’ promotes resolution’.²⁸ Court-connected ADR remains an integral feature of Australian litigation at the State, territory and federal level, and is typically ordered (or encouraged) by judges or registrars as an aspect of case management.²⁹

The contextual relevance of court-connected ADR to judicial mediation is obvious (because mediation is usually classified an ADR process) but, as explained in the preceding Chapters, it is only when judges are themselves engaged in the provision of such processes that the relevant implications of Ch III are enlivened. To what extent, then, has the advent of court-connected ADR actually affected the way in which Australian judges carry out their judicial functions, either during prehearing or at trial? There does not appear to have been any specific research undertaken on this point. However, there is evidence to suggest that Australian judges can and do engage in processes more commonly associated with ADR than adjudication, and that this may occur at various stages of the litigation process. This research is examined in detail later in this Chapter.³⁰ The following section demonstrates that there is an inherent overlap between court-connected mediation and prehearing conferences (including directions hearings and settlement/conciliation conferences). This overlap is widely acknowledged in the US, where settlement conferences often amount to a form of

²⁷ John Wade, “Current Trends and Models in Dispute Resolution, Part II”, (1998) 9 *Australian Dispute Resolution Journal* 59, 61.

²⁸ Council of Chief Justices *Australia and New Zealand Council of Chief Justices: Position Paper and Declaration of Principle on Court-connected Mediation* (1999).

²⁹ See above n 24.

³⁰ See especially, Annesley DeGaris, ‘The Role of Federal Court Judges in the Settlement of Disputes’ (1994) 13 *University of Tasmania Law Review* 217.

judicial mediation in practice. Building upon this analysis, this Chapter demonstrates that the Australian judicial role has also been transformed since the onset of case management, and through the provision of prehearing conferences in particular.

Increased judicial control of the civil trial process

Legal scholars and practitioners are in general agreement that, parallel to the increase in court-connected ADR, there has been a multi-jurisdictional trend towards greater judicial control over the civil trial process.³¹ One of the earliest and most authoritative formulations of this trend was provided by Mauro Cappelletti:

A general conclusion seems justified for both civil and common law jurisdictions: that behind and beyond the many remaining differences, powerful and multi-faceted converging trends are gaining momentum ... and that at the origin of these converging trends there is a common need to entrust more law-making responsibilities to the judges than was the case in other times ... [I]t is generally recognized that one feature common to many modern societies has been a tremendous growth of the judicial power ... [the two principle components of which are] ... the administrative procedural component and the substantive one'.³²

³¹ See generally: Marc Galanter, 'The Emergence of the Judge as a Mediator in Civil Disputes' (1986) 69 *Judicature* 257; Judith Resnik, 'Alternative Dispute Resolution and Adjudication: A Glimpse at Changes in the US' (Paper prepared for the Litigation Reform Commission Conference Civil Justice, Reform: Streamlining the Process, 1996, Brisbane); Ipp, 'Judicial Intervention in the Trial Process' (1995) 69 *The Australian Law Journal* 365; Adrian Zuckerman, 'Justice in crisis: Comparative dimensions of civil procedure' in Adrian Zuckerman (ed) *Civil justice in crisis: Comparative perspectives of civil procedure* (1999); Hugh F. Landerkin and Andrew J Pirie, 'Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?' (2003) 82(2) *Canadian Bar Review* 249.

³² Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (1989), 56-61.

The continuing poignancy of this proposition is demonstrated throughout the following analysis. The extent to which judges can or should actually ‘make law’, however, as opposed to merely interpreting it, is the subject of a classic (and ongoing) jurisprudential debate dominated by two broad and conflicting schools of thought: ‘legalism’³³ and ‘legal realism’.³⁴ As judicial mediation does not result in a determination, however, and does not therefore affect the content of substantive laws, it is the procedural component of judicial power with which the current examination is concerned. Subsequent analyses of the trend towards greater judicial control of the trial process (at least within common law jurisdictions) have tended to focus on this aspect of the judicial function as opposed to the law-making powers of judges in a substantive sense. Adrian Zuckerman, for example, has recognised:

³³ Legalism (or ‘legal formalism’ in US idiom) defends the traditional view that the determination of disputes by reference to non-legal or political factors (referred to in the pejorative as ‘judicial activism’) is antithetical to the judicial process, and that the rule of law, the separation of powers and *stare decisis* restrict the judicial role to the interpretation and incremental expansion of existing legal principles. ‘Activist’ judges, legalists argue, are guilty of ‘wilfully distorting the Constitution’, (Greg Craven, ‘The High Court of Australia: A Study in the Abuse of Power’ (1999) 22 *University of New South Wales Law Journal* 216, 217) politicising the judicial function, and blurring the (un-drawn) line between the legitimate progression of the common law and the usurpation of legislative power. The foundations of formalism are typically attributed to the writings of Christopher Langdell, *A Selection of Cases on the Law of Contract* (2nd ed, 1879), and were initially brought to life (ironically) by Oliver Wendell Holmes’ trenchant criticisms of Langdell’s ‘abstract’ legal reasoning, in *The Common Law* (1881) and ‘The Path of Law’ (1897) 10 *Harvard Law Review* 457. Legalism represented the orthodoxy of the High Court prior to the Mason CJ era, and reflects the view held by the majority of the current High Court. See Jason Pierce, *Inside the Mason Court Revolution* (2006), 109.

³⁴ Proponents of legal realism argue that strict legalism embraces the ‘phantasy of a perfect, consistent, legal uniformity’, (Jerome Frank, *Law and the Modern Mind* (1930), 253) that judges must often make value judgments between competing outcomes, and that judicial decisions cannot be immunised from political considerations. Legal realism reflects a number of related movements in sociological jurisprudence, including American realism (in particular Oliver Wendell Holmes, Roscoe Pound, Benjamin Cardozo, Wesley Hohfield, Karl Llewellyn and Jerome Frank) Scandinavian realism (see, eg, Axel Hägerström, *Philosophy and Religion*, (1964)) and critical legal theory (see, eg, Roberto Unger, ‘The Critical Legal Studies Movement’ (1983) 96 *Harvard Law Review* 561)). The common object of these movements is the empirical study of law and legal practice ‘as it is’, as opposed to how (according to strict legal doctrine) ‘it should be’. The High Court during the Mason CJ era was commonly identified as being predominantly ‘realist’ (or alternatively, by its critics, of being highly activist). According to Jason Pierce, ‘the aim of appellate litigation [in Mason CJ’s High Court] moved away from emphasizing dispute resolution toward a public model, in which High Court litigation [was] conceived as both a legal and political exercise’. Jason L. Pierce, *ibid* 145.

A general tendency towards judicial control of the civil process. Both common law countries and civil law countries display a shift towards the imposition of a stronger control by judges over the progress of civil litigation ... The USA has been leading the trend amongst common law countries. A culture of managerial judges is now well established there. In England and Australia the move towards judicial control is more recent, but it is equally dramatic.³⁵

For Adrian Zuckerman, therefore, the primary evidence of a shift towards greater judicial control of the trial process is the growth of case management. This phenomenon has been developing in the US for decades (discussed immediately below), and it is largely through the expansion of case management practices (and the prior development of settlement conferencing) that the procedural boundaries between ADR and traditional litigation in the US have been eroded. The following section reviews the primary commentaries and empirical studies which support this hypothesis in a US context. These materials, and the process of change in American courts (both State and federal), provide the theoretical approach by which the relationship between mediation and adjudication in Australia is examined later in this Chapter.

Theoretical approach to analysis: the American experience

Professor Galanter has distinguished between ‘two recurrent themes [the ‘warm’ theme and the ‘cool’ theme] which impel and justify judicial involvement in the

³⁵ Adrian Zuckerman, ‘Justice in crisis: Comparative dimensions of civil procedure’, above n 31, 47-48.

settlement process'.³⁶ The warm theme emphasises the perceived qualitative and social benefits of conciliation and settlement vis-à-vis adversarialism.³⁷ The cool theme, in contrast, 'emphasizes not a more admirable process but efficient institutional management'.³⁸ These themes are adopted in this section to distinguish between the development of settlement conferencing (the warm theme), on the one hand, and the subsequent development of case management (the cold theme), on the other.

It is uncontroversial to state that the 'USA has been leading the way amongst common law countries' in the judicial promotion of settlement (the warm theme).³⁹ However, and as noted later in this Chapter the option (or obligation) to seek settlement has a long history in certain civil law countries, and settlement conferences in common law systems may initially have developed in response to the perceived benefits of Continental style settlement models.⁴⁰ According to Marc Galanter, the first US Court to adopt 'something like a settlement conference' was the Circuit Court of Wayne County, Michigan:

In the 1920s, that court had devised procedures for untangling a chancery docket congested by mechanic's liens (produced by the 1920s building boom) and had extended them to mortgage foreclosures after the 1929 crash. In August 1930, those procedures were extended to the law side and a "Conciliation Docket" was set up.⁴¹

³⁶ Marc Galanter, 'The Emergence of the Judge as a Mediator in Civil Disputes', above n 31, 257.

³⁷ Ibid 257.

³⁸ Ibid. The relationship between qualitative and quantitative justice is examined in Chapter 1, above nn 159-81 and accompanying text.

³⁹ Ibid 258.

⁴⁰ Ibid.

⁴¹ Marc Galanter, 'The Emergence of the Judge as a Mediator in Civil Disputes', above n 36, 258.

The ‘Conciliation Docket’ developed in Wayne County (which, it is worth emphasising, was a direct response to a perceived overburdening of the courts) was reciprocated in various other US jurisdictions before prehearing conferences were federalised by the *Federal Rules of Civil Procedure* in 1938.⁴²

The US has also led the way in the development of case management (the cool theme).⁴³ Amongst other things, case management systems have embraced pre-existing settlement/conciliation conference models and retuned them with a view to increasing quantitative efficiency. In an early and influential article on the topic, Judith Resnik wrote critically of the transformation of US judges into ‘mediators, negotiators, and planners – as well as adjudicators,’⁴⁴ and argued that the increasing case management role of judges (which, in Judith Resnik’s view, focussed on quantitative efficiency to the exclusion of qualitative justice)⁴⁵ threatened the foundations of the adversarial system.⁴⁶ Whatever opinions are held regarding the merits of managerial judging or the judicial promotion of settlement, however, commentators generally agree that there has been a ‘move by [US] judges into mediator forms and functions and beyond solely adjudicative tasks’.⁴⁷ If these views are correct, then it is simply no longer possible (assuming it ever was) to define

⁴² Mark Galanter, ‘A settlement judge, not a trial judge: judicial mediation in the United States’ (1985) 12(1) *Journal of Law and Society* 1, 2.

⁴³ Astor and Chinkin, above n 6, 238. Sir Anthony Mason, ‘The Future of Adversarial Justice’ (Paper presented at the 17th AIJA Annual Conference, Adelaide, 7 August 1999) 4.

⁴⁴ According to Judith Resnik, managerial ‘judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review’. Judith Resnik ‘Managerial Judges’ (1982-83) 96 *Harvard Law Review* 374, 378.

⁴⁵ Ibid 422.

⁴⁶ Ibid 445.

⁴⁷ Landerkin and Pirie, above n 31, 250. Sourdin, ‘Judicial Management and Alternative Dispute Resolution Process Trends’, above n 4, 187.

mediation and adjudication in the US in dichotomous terms. Marc Galanter drew this conclusion as long ago as 1985, observing that,

on the contemporary American scene at any rate, the negotiated settlement of civil cases is not a marginal phenomenon; it is not an innovation; it is not some unusual alternative to litigation. It is only a slight exaggeration to say that it *is* litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals that might fancifully be called LITIGOTIATION.⁴⁸

Marc Galanter has repeated this proposition on a number of occasions in the years since,⁴⁹ and was one of the first commentators to suggest that the judicial function can be represented on an ‘adjudication matrix’.⁵⁰ This matrix suggests ‘a series of contrasts and polarities’ between adjudicative processes, which ‘represent points on a set of continua’.⁵¹ The final section of this Chapter draws upon this model in order to construct a ‘procedural continuum’; representing the relationship between mediation and adjudication in the Australian judicial function.

The conclusions drawn by the US commentators cited above reflect primary research, which indicates that a high proportion of US judges (State and federal) have adopted facilitative and evaluative techniques for some time. In 1980, John Paul Ryan, Allan Ashman, Bruce D Sales and Sandra Shane-Dubow surveyed in excess of 2500 State

⁴⁸ Mark Galanter, ‘A settlement judge, not a trial judge: judicial mediation in the United States’, above n 42, 1.

⁴⁹ See especially: Marc Galanter, ‘The Emergence of the Judge as a Mediator in Civil Disputes’, above n 36; Marc Galanter and Maria Cahill, “‘Most Cases Settle’” Judicial Promotion and Regulation of Settlements’ (1994) 46 *Stanford Law Review* 1339.

⁵⁰ Galanter, ‘Adjudication, Litigation and Related Phenomena’, in Leon Lipson and Stanton Wheeler (eds), *Law and Social Sciences* (1986), 151.

⁵¹ *Ibid* 153.

trial judges. They reported that nearly 70% intervened subtly ‘through the use of cues/suggestions’, more than 10 percent intervened by applying ‘direct pressure’, and that less than 22% considered themselves to be non-interventionist.⁵² It is necessary to point out, however, that the accuracy of this survey data has since been brought into question, both for its failure to adequately define terms (such as ‘direct pressure’)⁵³ and because the phrasing of the survey questions may have suggested to participants that it was confined to settlement conferences (as opposed to the litigation process more generally).⁵⁴

One critic of this study, Herbert Kritzer, conducted a separate survey of federal court judges and lawyers in 1982 on behalf of the Civil Litigation Research Project (established by the Universities of Wisconsin and South Carolina). He found ‘substantial variations in the level of intensity,’⁵⁵ but concluded that while ‘judges do presently tend to intervene in the nonadjudicative aspects of case processing, [they do not do so] in an intensive manner’.⁵⁶ The federal context of the study makes direct comparison with John Paul Ryan et al’s study of State trial judges difficult. While Herbert Kritzer uncovered less evidence of ‘high intensity’ intervention than John Paul Ryan et al, however, both of these studies reported high levels of low intensity (or ‘subtle’) interventions. Both accounts therefore support Marc Galanter’s suggestion that judicial practice can be plotted on an ‘adjudication matrix’. What differs is *where* on the various continua comprising that matrix these studies would have placed the practice of US State and federal judges respectively in the early 1980’s.

⁵² John Paul Ryan et al, *The American Trial Judge* (1980) 177.

⁵³ Herbert Kritzer, ‘The judges’ role in pre-trial case process’ (1982) 66 *Judicature* 28, 30.

⁵⁴ Galanter and Cahill, ‘Most Cases Settle’, above n 49, 1342 (n 180).

⁵⁵ Ibid.

⁵⁶ Kritzer, above n 53, 35.

One final study deserves mention. In a series of papers published in the early 1980's, James Wall, Lawrence Schiller, and Ronald Ebert surveyed lawyers and judges operating at the US State and Federal level to ascertain which settlement techniques were commonly employed by judges during prehearing,⁵⁷ whether those techniques were considered ethical by lawyers and judges,⁵⁸ and how successful lawyers and judges considered each of those techniques to be in promoting settlement.⁵⁹ The survey identified some 71 techniques in total, including suggesting that parties 'split the difference', 'channelling discussion to areas which have the highest probability of settlement', and setting 'inexorable trial dates to raise pressure'.⁶⁰ The authors also identified various evaluative techniques (such as pointing out to a party 'the strengths and weaknesses of his case').⁶¹

Assuming that US judges have not become less interventionist in the period since the aforementioned studies were conducted, it may reasonably be concluded that US judges engage in facilitative settlement techniques prior to and during the final hearing. As explained in Chapter 1, the classic mediation model is purely facilitative in nature, and theoretically involves similar facilitative techniques to those identified by Wall et al, and/or the 'low intensity' interventions identified by Herbert Kritzer. If these studies are accurate, then a facilitative model of judicial mediation is generally consistent with US judicial practice. While the research suggests that US judges are

⁵⁷ James A. Wall and Lawrence F Schiller, 'Judicial Settlement Techniques' (1981) 5 *American Journal of Trial Advocacy* 39.

⁵⁸ James A. Wall and Lawrence F Schiller, 'Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log' (1982) 6 *American Journal of Trial Advocacy* 27.

⁵⁹ James A. Wall, Lawrence F Schiller and Ronald J. Ebert, 'Should Judges Grease the Slow Wheels of Justice? A Survey on the Effectiveness of Judicial Mediation Techniques' (1984) 8 *American Journal of Trial Advocacy* 83.

⁶⁰ *Ibid* 96-100.

⁶¹ *Ibid*. The authors referred to all of these techniques as 'settlement techniques', but were referring primarily to the object of intervention, as opposed to the nature of that intervention.

generally less inclined to engage in evaluative processes during settlement, it also indicates ‘an expansive range of approaches to settlement work by judges,’⁶² and it is apparent that a number of US judges do intervene in such a manner. Indeed, Californian Federal Magistrate Judge Wayne Brazil has stated candidly that:

The settlement conference process as I usually manage it bears little resemblance to classic mediation (facilitative or transformative). Structurally (not in fact or philosophically), I am at the centre and the parties are not. Instead of the parties assuming the primary roles in the mechanics of the process and accepting primary responsibility for the course, character, and outcome of the proceedings, I take up much of this space ... And, in the private caucuses, I talk too soon and too much. I interrupt. I often direct the subject-matter course of the discussions. Sometimes I interact more with the lawyers than with their clients. I do not devote a lot of effort to searching for subtle underlying interests or needs. But I do try to identify what is most important to the parties – which, much more often than not in judicially hosted settlement conferences, is money. And most of the time in our negotiating sessions we are attending to (or at least looking repeatedly over our shoulders at) two 800 pound gorillas: the evidence and the law.⁶³

In summary, the US literature reveals a considerable variation in judicial practice, and demonstrates that what American judges do cannot be wholly conceptualised within the rubric of ‘determinative’ functions. The impression of scholars and jurists alike is

⁶² Wayne Brazil, ‘Professionalism and Misguided Negotiating’, in Andrea Schneider and Christopher Honeyman (eds), *The Negotiator’s Fieldbook: The Desk Reference for the Experienced Negotiator* (2006) 697, 699. ‘Magistrate judges’ are appointed under Title 28 of the *United States Code* and exercise powers delegated to them by District Court judges.

⁶³ Wayne Brazil, above n 62.

that there has been a general migration towards facilitative and evaluative interventions.

To what extent, then, as Adrian Zuckerman states, has the move toward judicial control of the trial process been equally as ‘dramatic’ in Australia? Is it also possible to plot Australian judicial practices on an adjudication matrix? In the remainder of this Chapter it is argued that the answer to both of these questions is ‘yes’, but that the process of change does not appear to have shifted the boundaries of acceptable practice quite as far in Australia as it has in the US. This is significant because the implications drawn by the High Court from Ch III reflect flexible concepts such as due process and inherent jurisdiction, which are applied in accordance with contemporary mores.⁶⁴

What do Australian judges do?

The process of procedural reform in Australia has been well documented.⁶⁵ According to Justice Ronald Sackville, for example:

While the core functions discharged by the judiciary remain intact, the manner in which those functions are discharged has been transformed. Moreover, the transformation has occurred over a very brief period of time. The courts have responded to insistent demands for greater “access to justice” by accepting responsibility for tasks that would have seemed alien to

⁶⁴ See below nn 259-63 and accompanying text.

⁶⁵ Hilary Astor and Christine Chinkin state that in ‘the 1990’s a plethora of initiatives in state and federal courts progressively introduced measures designed to increase further court control over the progress of cases with the objectives of reducing backlogs and delays. Australian courts followed those in the United States (US) that had moved earlier towards a more activist role for judges and where judges were increasingly willing to direct the progress of cases’. Astor and Chinkin, above n 6, 238.

the judicial role only two or three decades ago. Indeed the extent of change has been such that its significance is not fully appreciated within the judiciary itself.⁶⁶

It is difficult to authoritatively establish a trend towards greater judicial control of the civil trial process in Australia (because the historical data is insufficient to accurately determine how past judges have carried out their judicial functions), but whether there has truly been a transformation of the judicial function or not, there is sufficient empirical and anecdotal evidence to conclude that Australian judges now engage in techniques commonly associated with mediation. As in the US, the adoption of these techniques has (ostensibly) been made possible by the introduction of case management systems and the development of settlement conferencing. More recently, legislatures have also introduced 'less adversarial trials' in certain jurisdictions, which might be viewed as an expansion upon case management principles, and which involve a 'blending' of adversarial and inquisitorial techniques.⁶⁷ The following section examines these developments in detail, and demonstrates that, in reality, the precise nature of these processes has more to do with what judges perceive their role in the settlement process to be, than it does any rigid structural distinction between the rules supporting them.

⁶⁶ Sackville, 'From Access to Justice to Managing Justice: The Transformation of the Judicial Role' , above n 66, 1. Tania Sourdin has also stated that it 'is beyond dispute that courts now practice a form of judicial management that would have been unimaginable in earlier years. Indeed, the trend towards the adoption of judicial management techniques and ADR processes has been viewed as somewhat urgent and necessary by many courts. As one judge has remarked: "Unless that trend continues and further reforms are adopted, the legal system as practised in Australia, and in other countries with a similar jurisprudential foundation, is likely to collapse."' Sourdin, 'Judicial Management and Alternative Dispute Resolution Process Trends', above n 4, 187, citing Justice James Wood, 'Litigation Through the 1900s: Alternative Dispute Resolution and Case Management' (Paper presented at the International Legal Conference, Whistler, Canada, January 1993), 3. The proposition that common law systems are or were in danger of 'collapse' is addressed in Chapter 1. At that stage it was concluded that this proposition is probably an overstatement, but that substantial improvements may nevertheless be made.

⁶⁷ Sourdin, 'Facilitative Judging', above n 13, 77.

Case management

Two important preliminary points should be made about case management in Australia. The first point is that case management has been developed largely by the Australian judiciary itself.⁶⁸ This is in contrast with other common law countries (and the UK in particular)⁶⁹ where case management is the product of (relatively recent) legislative action, or a response to external scrutiny.⁷⁰ The second point is that case management has been a *sine qua non* of the Australian civil trial process for some time.⁷¹ As Justice Wood has observed:

Some form of case management has always existed. The question for decision by each court [therefore] is who should assume the responsibility for management, when it should apply to any particular case, and what form or forms it should take.⁷²

In part, the judicial development of case management in Australia can be attributed to the (federal) introduction of judicial self governance in 1979,⁷³ which saw the

⁶⁸ Pierce, above n 33, 13.

⁶⁹ Peter Sallmann and Richard Wright, 'Going to Court: A Discussion Paper on Civil Justice in Victoria (Civil Justice Review Project (1999)), 67-68.

⁷⁰ Justice Ronald Sackville, 'Courts in Transition: An Australian View' (Paper presented at the New Zealand Court of Appeal/High Court Judges and Masters Conference, Mt Ruapehu, 20 – 23 March 2003), 15. Justice Sackville states that: 'In contrast to the United Kingdom, case management has not generally been imposed on the courts in consequence of recommendations by external bodies, such as independent reviews of the judicial system, but has been implemented by the courts themselves over a long period of time'. See also, Sallmann and Wright, *ibid*.

⁷¹ Justice Ronald Sackville, 'Some Thoughts on Access to Justice' (Paper presented to the First Annual Conference on the Primary Functions of Government, Wellington, November 2003), 14; Chief Justice Murray Gleeson, 'Managing Justice in the Australian context' (2000) 77 *Reform* 62, 64.

⁷² Justice James Wood, 'The changing face of case management: the New South Wales experience' (1995) 4 *Journal of Judicial Administration* 121, 123. Justice Wood went on to express his belief that it 'cannot be gainsaid that case management challenges established work practices and beliefs and calls for a fundamental change in the judicial role'.

⁷³ *High Court of Australia Act 1979* (Cth).

legislative transfer of ‘responsibility for the administration of the High Court from the Attorney-General’s Department to the Court itself’.⁷⁴ Similar legislation has since granted self-governance to the majority of State and federal courts,⁷⁵ although (as explained below) the Federal Court has effectively practised case management since its inception in any event.⁷⁶ One outcome of self-governance is that Australian courts are able to determine for themselves how best to balance the interests of individual justice and the availability of resources. In fact, and as was explained in Chapter 4, Australian courts have always enjoyed an element of self-governance in procedural matters through the exercise of incidental or inherent jurisdiction. Thus, although the courts may now have more direct control over their finances, self-governance was not an essential pre-requisite to the development of case management. The important point, though, is that the development of case management is more readily attributable to judicial pragmatism in the face of wide-spread concerns regarding excessive delays in litigation,⁷⁷ than it is to direct judicial reform by government.⁷⁸ State and federal parliaments may have provided the courts with broad case management objectives, but it is the courts themselves that have developed case management in practice.⁷⁹

⁷⁴ Sackville, ‘From Access to Justice to Managing Justice: The Transformation of the Judicial Role’, above n 66, 8.

⁷⁵ The *Courts and Tribunals Administration Amendment Act 1989* (Cth) granted self governance to the Family Court, Federal Court and the Administrative Appeals Tribunal. See also the *States Courts Administration Act 1993* (SA).

⁷⁶ Justice Bryan Beaumont, ‘Managing litigation in the Federal Court’ in Brian Opeskin and Fiona Wheeler (eds) *The Australian Federal Judicial System* (2000), 163.

⁷⁷ Sallmann and Wright, above n 69, 67; Sackville, ‘Courts in Transition: An Australian View’ above n 70, 16-17.

⁷⁸ Pierce, above n 33, suggests that case management can be attributed to the activism of a ‘group of entrepreneurial High Court judges’ during the Mason CJ era. However, it might also be argued that it resulted from a period of judicial policy making spearheaded by Brennan CJ.

⁷⁹ This conclusion must be qualified. The general principles espoused by case management are also evident in various over-arching statutes, including the *Evidence Act 1995* (Cth), which provides judges with wide-ranging discretions in relation to the admission, timing and presentation of evidence. Section 26 of the *Evidence Act*, for example, allows the Court to ‘make such orders as it considers just, in relation to: (a) the way in which witnesses are to be questioned; and (b) the production and use of documents and things in connection with the questioning of witnesses; and (c) the order in which parties may question a witness; and (d) the presence and behaviour of any person in connection with the questioning of witnesses’.

This observation adds strength to the conclusion drawn in Chapter 8; that judicial mediation is likely to develop principally within the incidental/inherent jurisdiction of the courts.

What is case management?

Case management is an umbrella term for a variety of approaches ‘to the control of litigation in which the court assumes responsibility for the progress of cases through pre-trial stages’.⁸⁰ Certain features of case management are common to all systems. The American Bar Association (ABA), for example, has stated seven ‘necessary ingredients’ of case management:

- Court supervision and control from filing to disposition
- Time and clearance standards for overall disposition
- Times for conclusion of critical steps in litigation, including things like discovery
- Early identification of long or otherwise potentially problematic cases
- Trial setting policy which schedules an appropriate number of cases to ensure the efficient use of judge time, while minimising the need to re-fix cases as a result of over scheduling
- Commencement of trials on the original date scheduled with adequate advance notice
- Firm consistent adjournment policies⁸¹

⁸⁰ *Butterworths Concise Australian Legal Dictionary* (3rd ed, 2004), 63.

⁸¹ American Bar Association Judicial Administration Division, *Standards Relating to Trial Courts*, (1992). See also, Maureen Solomon and Douglas Somerlot, *Caseflow Management in the Trial Court: Now and for the Future* (1987); Wood, ‘The changing face of case management: the New South Wales experience’, above n 72, 3.

While there is general agreement as to the underlying features of case management, however, it ‘has always been acknowledged that each jurisdiction, and often each individual court, must make its own arrangements based upon the particular needs of the jurisdiction or court in question’.⁸² There are, consequently, various models of case management in operation in Australia and internationally, ‘which may involve judges and/or other court officials such as masters or registrars controlling the progress of litigation from the time of commencement’.⁸³ According to Peter Sallmann and Richard Wright, models vary in terms of the ‘type and level of court supervision involved’, ‘the method of listing cases’, and in the ‘streaming of cases’.⁸⁴ Various overarching case management techniques and philosophies have also passed in and out of favour (or ignominy)⁸⁵ over the years, including ‘individualised justice,’⁸⁶ ‘differential case management’⁸⁷ (DCM) and, more recently, ‘proportionality’.⁸⁸

An increasingly popular model of case management internationally is the individual docket system (‘IDS’), whereby each case is assigned to a single judge from commencement to disposition.⁸⁹ IDS can be contrasted with the more traditional

⁸² Sallmann and Wright, above n 69, 72.

⁸³ Justice Robert French, ‘Managerial Judging in the Federal Court’ (2005) 32(8) *BRIEF* 5, 7.

⁸⁴ Sallmann and Wright, above n 69, 72-73.

⁸⁵ DCM was criticised by the President of the NSW law society who argued, inter alia, that it would increase the costs of litigation. See Sourdin, ‘Judicial Management and Alternative Dispute Resolution Process Trends’, above n 4, 192; Jeremy Badgery-Barker and Joanne Harrison, ‘A short way down the track: differential case management in the Supreme Court’ (1995) 33(5) *Law Society Journal* 34.

⁸⁶ Patrick Atiyah, *From Principles to Pragmatism*, (1978); Chief Justice Murray Gleeson ‘Individualised justice -- The holy grail’ (1995) 69 *Australian Law Journal* 421, 430.

⁸⁷ See, eg: Valerie Simmons, ‘Differentiated Case Management and Alternative Dispute Resolution – The Western District’s Plan to Reduce Costs and Delay in Civil Litigation’ (1993) 72 *Michigan Bar Journal* 1010; Tania Sourdin states that in ‘Australia, the movement towards differential or differentiated case management although not driven by any edict has been driven by the truism “justice delayed is justice denied.”’ Sourdin, ‘Judicial Management and Alternative Dispute Resolution Process Trends’, above n 4, 192.

⁸⁸ Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, ALRC Report No 89 (2000), [1.95].

⁸⁹ Australian Law Reform Commission, above n 88, 78.

Master Calendar System ('MCS'), whereby a court's case load is managed by registrars and other court personnel, and cases are not assigned to a single judge.⁹⁰ The majority of Australian court registries operate under the MCS model,⁹¹ but the Federal Court has adopted the IDS model. While the benefits of IDS (in terms of reducing costs and delays whilst balancing the interests of qualitative justice) remain empirically untested,⁹² there is widespread support for IDS in preference to other models, such as MCS.⁹³ The model of case management employed is not critical to the success of judicial mediation but, as explained (and disputed) in Chapter 8, it is generally accepted that a judge who has mediated should excuse him or herself from subsequent adjudication.⁹⁴ Thus, it may not be possible to maintain a truly 'individual' docket if judicial mediation fails to result in settlement. This does not undermine the essential nature of IDS, however, as it is well recognised that judges should recuse themselves in cases of apprehended bias.⁹⁵

How, then, does case management work? How do courts and judges actually manage the process of litigation? It is crucial to appreciate that case management systems merely provide the 'scaffolding upon which [judges, registrars or masters] can construct, in conjunction with the parties, the plan that best suits the efficient and economical and fair conduct of any particular proceeding'.⁹⁶ Consequently, case

⁹⁰ Sallmann and Wright, above n 69, 75.

⁹¹ Stephen Colbran et al, *Civil Procedure: Commentary and Materials* (3rd Ed 2005), 31-32.

⁹² Sackville, 'Courts in Transition: An Australian View', above n 70, 19-20.

⁹³ Sallmann and Wright, above n 69, 79-83; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, (2000), [6.9], [7.6].

⁹⁴ See below Chapter 8 nn 159-74 and accompanying text.

⁹⁵ *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 258-63 Barwick CJ, Gibbs, Stephen and Mason JJ). Note that judges should also be careful not to recuse themselves too readily, however, as this could allow litigants to 'shop' for their own judge. See, *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352 (Mason J); *Attorney General of New South Wales v Klewer* [2003] NSWCA 295 (Unreported, Mason P, Meagher JA and Davies AJA, 15 October 2003); and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 348 [19] - [23] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁹⁶ French, above n 83, 8.

management systems cannot be reduced to the level of binary rules. Rather, case management systems provide courts with broad procedural discretions in relation to the conduct of proceedings, the evidence that can be presented at trial, and the provision of court-connected ADR.⁹⁷ It is in the interpretation of these broad discretions that the blending of ADR and adjudication has taken place.⁹⁸ The following section analyses a selection of prehearing events (comparable in many respects with judicial mediation) which exemplify this proposition, in order to demonstrate that infringements of Ch III are unlikely to occur as a result of novel prehearing processes.

Directions Hearings and Prehearing Conferences

Case management is ordinarily facilitated by a combination of statute, delegated legislation (in the form of court rules), practice notes and ‘strategic plans published by Australian Courts’.⁹⁹ In the majority of Australian jurisdictions, directions hearings (known variously as procedural hearings or prehearing conferences) provide the springboard for the adoption of other prehearing events, and ‘the general framework within which judicial case management operates’.¹⁰⁰ Directions hearings are themselves a product of third-wave reform, and (as explained below) may amount to a limited form of judicial mediation in certain circumstances.

⁹⁷ For example, Order 1(8) of the *Federal Court Rules 1979* (no. 140 as amended), states that ‘The Court may dispense with compliance with any of the requirements of the Rules, either before or after the occasion for compliance arises’.

⁹⁸ *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 169 (Kirby J). Ronald Dworkin describes ‘discretion’ as ‘an area left over by a surrounding belt of restriction’. The discretionary nature of court rules is emphasised by the fact that the judges may ordinarily choose not to apply them (Ronald Dworkin, *Taking Rights Seriously* (1977), 31). Keith Hawkins has similarly defined legal discretion, ‘as the space, as it were, between legal rules in which legal actors may exercise choice’. (Keith Hawkins, ‘The Use of Legal Discretion: Perspectives from Law and Social Science’ in Keith Hawkins (ed), *The Uses of Discretion* (1992), 11).

⁹⁹ Sackville, ‘From Access to Justice to Managing Justice: The Transformation of the Judicial Role’, above n 66, 13.

¹⁰⁰ French, above n 83, 8.

The proposition that directions hearings constitute the ‘source of power’¹⁰¹ for case management is well illustrated by the Federal Court model. In the interests of clarity and brevity the current analysis is restricted to this model, but the general function of the directions hearing is comparable in most Australian jurisdictions.¹⁰² In the Federal Court, case management is supported by the *Federal Court of Australia Act 1976*,¹⁰³ and implemented in practice by the *Federal Court Rules 1979* (made by a judicial committee in accordance with S59 of that Act). Order 10 of the *Federal Court Rules 1979* provides that in the course of a directions hearing the Court (including a Court comprising a single judge)¹⁰⁴ may ‘give such directions with respect to the conduct of the proceeding as it thinks proper’. More specific guidance as to the exercise of this

¹⁰¹ French, above n 83, 8.

¹⁰² Subtle differences may be identified between directions hearings in the Federal Court and other Australian Courts (for example, on the basis that the Federal Court operates an individual docket system), but this fact does not alter the fundamental nature of directions hearings. The *Family Law Rules 2004* set out the Court’s general case management powers (including the power to order various prehearing conferences). The *Federal Magistrates Court Rules 2001* provide magistrates with the power to make pre-trial directions (reg 10.01), refer matters to mediation or arbitration (pt 27), or direct that the parties attend a conciliation conference (reg 10.05). The same principles apply to a greater or lesser degree at the State level. For example, regs 415 and 549 of the *Supreme Court Rules 2000* (Tas) provide the source of power for Supreme Court directions hearings and ‘pre-trial conferences’ respectively. Order 29 rr 5- 6 of the *Rules of the Supreme Court 1971* (WA) facilitate directions hearings in the Supreme Court of Western Australia. Directions hearings in the Supreme Court of Victoria are supported by O 23.06 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic), and Practice Note 1 of 1996: Civil case management. Following the introduction of the *Supreme Court Civil Rules 2006* (SA), the Supreme Court of South Australia no longer holds prehearing conferences as such. These have been replaced by ‘status hearings’ (r 125) and ‘settlement conferences’ (r 126), which amount to essentially the same thing. In NSW a relatively high degree of case management guidance is provided by primary legislation, in order to rationalise procedure throughout the system. The case management principles supported by the *Civil Procedure Act 2005* (NSW) (which applies to all NSW courts) are implemented in practice by the *Uniform Civil Procedure Rules* (NSW) (created by judicial committee in accordance with s 9 of that Act), but directions hearings are facilitated by ss 61-62 of the *Act*. In contrast, s 118 the *Supreme Court of Queensland Act 1991* provides only limited guidance in terms of case management, and leaves the form of directions hearings to court rules and practice directions. The *Uniform Civil Procedure Rules 1999* (Qld) (which applies to the Queensland Supreme Court, District Court and Magistrates Court) merely state that courts may hold ‘directions hearings’ in respect of a costs assessment, or otherwise make ‘directions’ (rr 299, 366-68). Case-flow management in the Supreme Court of Queensland is premised instead upon the overriding objective in r 5, and facilitated by the provision of timelines (as opposed to directions hearings as such) by practice direction (Practice Direction No 4 of 2002: Case Flow Management – Civil Jurisdiction).

¹⁰³ *Federal Court of Australia Act 1976* (Cth), s 53A(1).

¹⁰⁴ *Federal Court Rules 1979* (no. 140 as amended) O 10 r 1 (2) (a).

general discretion is provided throughout the remainder of Order 10, and includes the discretionary provision of orders in relation to, *inter alia*:

1. The production, admission and inspection of all documents, interrogatories and affidavits.
2. The timing, admission and format of evidence to be presented (including expert evidence).
3. The costs to be borne by the parties.
4. The mode of hearing.
5. The mandatory use of mediation and arbitration in respect of all or part of the dispute.
6. The referral of the parties to a settlement conference (conducted by a Registrar), or a case management conference (conducted by a Judge or a Registrar).¹⁰⁵

In most jurisdictions judges may conduct directions hearings themselves (and in certain limited cases do so exclusively),¹⁰⁶ but it is more common that they be conducted by a master or registrar, and transferred to a judge if the matter falls within a specialist list or presents particular management problems. This is the case in the Federal Court¹⁰⁷ and the Supreme Court of Western Australia,¹⁰⁸ and the *Family Law*

¹⁰⁵ *Federal Court Rules 1979* (no. 140 as amended) O 10 r 1(2).

¹⁰⁶ The Supreme Court of Victoria, for example, operates a number of specialist lists in respect of which a 'Judge-in-Charge ... gives directions to parties from the early stages of each proceeding'. Stephen Colbran *et al*, above n 91, 37-38. Lists currently operate in respect of cases falling within the following specialisms: Admiralty, Building Cases, Commercial, Corporations, Intellectual Property, Judicial Review and Appeals, Major Torts, Personal Injuries, Valuation Compensation and Planning, Victorian Taxation Appeals. Similarly. In Western Australia, judges may conduct prehearing conferences in cases that fall within the Commercial and Managed Cases List (Supreme Court of Western Australia, Practice Direction No 4 of 2006).

¹⁰⁷ Chief Justice Michael Black, 'The Courts Tribunals and ADR' (1996) 7 *Australian Dispute Resolution Journal* 138; Sourdin, 'Facilitative Judging', above n 13, 70.

Rules 2004 provide that, a ‘procedural hearing’¹⁰⁹ may be held by a court officer if a conciliation conference fails to resolve the case.¹¹⁰ The purpose of directions hearings in all instances is to streamline cases prior to the trial event, and not (directly at least) to encourage settlement before that stage.

In addition to the provision of formal directions hearings, certain Australian case management systems also provide judges or court officers with the option to order less formal prehearing conferences. In the Family Court, for example, mandatory registrar led case management conferences are conducted during the prehearing determination stage, in order ‘to enable the parties to attempt to resolve the case, or any part of the case, by agreement’.¹¹¹ In the Federal Court, as noted above, case management conferences may be conducted by a judge or a registrar, and are intended to provide an alternative forum in which to ‘consider the most economic and efficient means of bringing the proceedings to trial and of conducting the trial’.¹¹² However, the informal nature of the case management conference means that judges in the Federal Court may theoretically promote settlement or compromise between parties, evaluate parties’ positions, and/or facilitate negotiations between parties. Such interventions may be subtle, and may take place in the shadow of the available power (or order) as well as in the exercise of it.¹¹³ As Justice French (as he then was) explained, case management conferences in the Federal Court:

¹⁰⁸ Supreme Court of Western Australia, Practice Direction No 6 of 2005 ‘Case Management in the Supreme Court’; now contained in the *Supreme Court Consolidated Practice Directions* (Jan 2009).

¹⁰⁹ *Family Law Rules 2004*, r 12.04.

¹¹⁰ *Family Law Rules 2004*, r 12.03 (3).

¹¹¹ *Family Law Rules 2004*, r 12.03. See also Family Court of Australia, Case Management Directions, Practice Direction 3 of 2004, 6.6.

¹¹² *Federal Court Rules 1979* (no. 140 as amended) O 10, r 1(2)(h)(i).

¹¹³ Boule, above n 6, 132.

involve the judge sitting around a conference table with the parties and their advisers to discuss the best way to approach prehearing management and the conduct of the trial. Whilst in the formal sense it is still a prehearing conference and formal orders will be made at the end of it, the ‘psychological landscape’ is less adversarial than that which exists in a courtroom. There is more scope for the parties and their advisers to take a reasonably practical approach to ensuring the case gets on expeditiously and narrows down to the real issues. In a sense, it is a kind of procedural mediation or discussion chaired by the trial judge.¹¹⁴

A strict application of ADR theory would dictate that case management conferences cannot be a form of mediation.¹¹⁵ For one thing, judges must ultimately make orders which (depending upon the success of the conference) may be determinative in nature and, as noted in Chapter 1, it is generally agreed that mediators have no authoritative decision-making power.¹¹⁶ Moreover, the primary object of all prehearing conferences (however formal or informal) is to organise the presentation of substantive arguments during mediation or the final hearing.¹¹⁷ A judge’s substantive knowledge of the dispute is also (ideologically) minimal at this stage, and so, correlatively, is his or her ability to facilitate in a substantive sense.¹¹⁸ Correspondingly, Order 10 of the *Federal Court Rules* does not (directly) envisage

¹¹⁴ French, above n 83, 9.

¹¹⁵ Sir Laurence Street, ‘The Courts and Mediation – A Warning’ (1991) 2 *Australian Dispute Resolution Journal* 203; (1993) 67 (7) *Australian Law Journal* 491, 492.

¹¹⁶ Boulle, above n 6, 65; Sourdin, above n 6, 28; National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms*, above n 8.

¹¹⁷ Paragraph 4.1.2 (7) of the *Supreme Court Consolidated Practice Directions* (Jan 2009) (WA), for example, states that the ‘general objective of the CMC List is to bring cases to the point where they can be resolved by mediation or tried in the quickest, most cost effective way, consistently with the need to provide a just outcome’.

¹¹⁸ Sourdin, ‘Facilitative Judging’, above n 13, 77.

judges holding settlement conferences or judicial mediations. According to Justice Mansfield:

A case management conference is [not] a form of mediation. That is a different matter. The case management conference is not to induce settlement of the dispute between the parties (that is a matter for the parties, whether or not assisted by mediation). It is to ensure that the dispute between the parties is properly defined and is addressed at the hearing by relevant evidence as efficiently and fairly as possible.¹¹⁹

From a purely taxonomical perspective these views have merit, but it is nevertheless possible that case management conferences will result in settlement, and that judges may intentionally utilise prehearing conferences to this end. Some 30 years ago, in a comparative study of court processes in Los Angeles funded by the NSW Law Reform Commission, John Bishop observed that:

Whilst prehearing conferences are primarily intended to simplify issues, make suitable amendments to the pleadings, limit the number of expert witnesses, obtain admissions of facts and generally prepare cases for trial, they are instrumental in effecting a large number of settlements at once or shortly after they are held.¹²⁰

As noted earlier, the processes adopted during prehearing conferences prior to the provision of orders may vary greatly, and are not formally prescribed by rules of court

¹¹⁹ Justice John Mansfield, 'Opportunities and Challenges: Evidence in cases under the *Trade Practices Act 1974*' (Paper presented to the Competition Law Conference, 24th May 2008, Sydney), 29.

¹²⁰ Law Reform Commission of New South Wales, *Studies in Comparative Civil and Criminal Procedure: Volume 2 - Innovations in Civil and Criminal Procedure*, Consultants Paper by John Bishop (1978), 19.

or statute. Rather, prehearing conferences are facilitated by the provision of broad procedural discretions. This discretionary framework provides general authority for the court to engage in the hearing, and may also indicate the procedural issues that might be determined in the course of the hearing. However, substantive decision-making may also take place during prehearing conferences, even although the power to do so does not spring (in a formal sense) from rules of court or statute. Although prehearing conferences are ideologically procedural in nature, therefore, and will not ordinarily amount to a form of mediation in the sense defined in Chapter 1, they may constitute ‘a kind of procedural mediation’ in practice.

In any event, various options also now exist for courts to engage with disputants in a substantive sense prior to the commencement of trial. Procedures such as settlement conferencing and conciliation conferencing can be classified as ‘prehearing assisted decision-making processes’ in that, although judges or court officers may facilitate negotiations concerning the substantive rights and interests of the parties, they do not formally adjudicate an outcome and the process does not take place during the final hearing. As James Wall *et al* have explained, ‘agreement cannot generally be forced, because either side can refuse to settle and can take the case to trial’.¹²¹

Settlement Conferences

Earlier it was noted that US judges have conducted settlement (or conciliation) conferences since (at least) the early 1920’s,¹²² and that case management developed much later – towards the end of the 1970’s. In Australia the opposite is true, and

¹²¹ James A. Wall, Lawrence F Schiller, Ronald J. Ebert, ‘Should Judges Grease the Slow Wheels of Justice?’, above n 59, 89.

¹²² Galanter, ‘A settlement judge, not a trial judge: judicial mediation in the United States’, above n 42, 2.

settlement conferences first developed as an aspect of case management during the 1980's and 1990's.¹²³ Hilary Astor and Christine Chinkin suggest that Victoria was one of the first States to introduce settlement conferences in 1984 (described as pre-trial conferences),¹²⁴ and South Australia introduced a similar process in 1996. Section 10 of the *Statutes Amendment (Mediation, Arbitration and Referral) Act 1996* (SA) amended the *Supreme Court Act 1935* (SA), s 65 of which now provides that:

(4) The court may itself endeavour to achieve a negotiated settlement of a civil proceeding or resolution of any issues arising in a civil proceeding.

(5) A judge or master who attempts to settle a proceeding or to resolve any issues arising in a proceeding is not disqualified from taking further part in the proceeding but will be so disqualified if he or she is appointed as a mediator in relation to the proceeding.

Rule 126 of the *Supreme Court Civil Rules 2006* (SA) expands upon s 65, and provides for compulsory settlement conferences during which the Court is 'to explore the possibility of reaching a settlement of the action [or] the appropriateness of referring the action or certain aspects of it for alternative dispute resolution'.¹²⁵ It will be noted that s 65 also provides South Australian judges with the capacity to engage in judicial mediation; a possibility examined in Chapter 8.¹²⁶

The settlement models established in Victoria and South Australia remain the exception to the rule in Australia. In most jurisdictions, court rules stop short of

¹²³ Astor and Chinkin, above n 6, 237.

¹²⁴ Ibid.

¹²⁵ *Supreme Court Civil Rules 2006* (SA), s 126.

¹²⁶ See below Chapter 8 nn 10-13.

positively endorsing or requiring the promotion of settlement before trial.¹²⁷ In this respect Australia differs significantly from the US where, as noted above, the promotion of settlement by judges preceded the advent of case management. In an early recognition of this distinction, Justice Andrew Rogers explained that:

Today, in the United States the virtue of active judicial participation in settling civil cases is part of the received wisdom. As has been said, “[j]udicial activism in the trial settlement process appears to have received quasi-official sanction within the judicial family.” ... The hallmark of change is that mediation is not regarded as radically separate from adjudication but as part of the same process. Litigation and negotiation are not viewed as distinct but as continuous ... In Australia, apart perhaps from some fairly generalised platitudes about costs and the stresses of litigation, generally speaking, judges have refrained from the role accepted by their Brethren in the United States.¹²⁸

It is only a slight exaggeration to say that Justice Roger’s article has also become ‘part of the received wisdom’ in Australian dispute resolution theory.¹²⁹ It should be borne in mind, however, that this extract is now over 20 years old, and (as demonstrated later in this Chapter) judicial attitudes in Australia towards the judicial promotion of settlement would appear to have softened in recent years. For the reasons outlined in the preceding section, it is also now difficult to draw firm distinctions between directions hearings (which are notionally procedural in nature), and settlement

¹²⁷ Nadja Alexander, Walther Gottwald and Thomas Trenczek, ‘Mediation in Germany: The Long and Winding Road’ in Nadja Alexander (ed), *Global Trends in Mediation* (2006) 223, 250.

¹²⁸ Justice Andrew Rogers, ‘Judges in Search of Justice’ (1987) 10 *University of NSW Law Journal* 93, 104; citing Judge Charles Renfrew, ‘Negotiation and Judicial Scrutiny of Settlements in Civil and Criminal Anti Trust Cases’ (1975) 57 *Chicago Bar Record* 130, 131.

¹²⁹ See, eg, Sourdin, ‘Judicial Management and Alternative Dispute Resolution Process Trends’, above n 4, 199; Sourdin, *Alternative Dispute Resolution*, above n 6, 104; Boulle, above n 6, 132.

conferences (which involve judges in the promotion of settlement or resolution). The formal title afforded to a process is not necessarily a reliable indicator as to the nature of the process adopted in practice, and the statutory provisions, rule/s of court or practice direction upon which these processes are constructed will often be broad enough to support the judicial promotion of either outcome (especially since the near-universal introduction of overriding objectives in civil rules).¹³⁰ For example, and as noted above, Federal Court judges may engage in case management conferences, whereas settlement conferences are formally restricted to registrars. However, Federal Court judges have also engaged in a limited number of Federal Court mediations,¹³¹ which are more comparable to settlement conferences than they are directions hearings. Likewise, NSW judges are only formally authorised to conduct directions hearings,¹³² but judicial mediations have taken place in the NSW District Court pursuant to the general overriding objectives contained in the *Civil Procedure Act 2005* (NSW).¹³³ The proposition that judicial mediation is comparable to settlement conferences is developed further in the following Chapter.

Inquisitorialism

Earlier it was stated that notions of inquisitorialism have surfaced in common law countries as an aspect of the access to justice debate.¹³⁴ The following section

¹³⁰ Most Australian jurisdictions have now introduced 'overriding objectives' in their rules of civil procedure, instructing judges to a balance between quantitative-efficiency and qualitative-justice. See: *Rules of the Supreme Court 1971* (WA) O1 r 4B; *Supreme Court (General Civil Procedure Rules 1996* (Vic), r 1.14; *Uniform Civil Procedure Rules 1999* (Qld), r 5; *Civil Procedure Act 2005* (NSW), s 56; *Supreme Court Rules 2006* (SA), r 3.

¹³¹ Sourdin, 'Judicial Management and Alternative Dispute Resolution Process Trends', above n 4, 199.

¹³² *Civil Procedure Act 2005* (NSW), ss 61-62.

¹³³ Judge Margaret Sidis, 'Judicial Mediation in the District Court' (2006) 18(9) *Judicial Officers Bulletin* 74.

¹³⁴ See, eg: Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No. 20 (1997) 134-35. Mason, 'The Future of Adversarial Justice', above n 43.

examines the correlation between inquisitorialism and case management, and illustrates the influence that inquisitorial style processes have had upon the nature of the Australian judicial function.

While the trend toward greater judicial control over the trial process is multi-jurisdictional in nature, the extent to which there will be a 'need to entrust more law-making responsibilities to ... judges'¹³⁵ varies between jurisdictions. In procedural terms, the range of this variation is generally at its widest between common and civil law systems, because civil law judges have traditionally played a more active role in proceedings than their common-law counterparts. The more active role of civil law judges represents an important ideological distinction between the inquisitorial (or 'continental' style) procedural model developed in civil law jurisdictions, and the adversarial procedural model developed in common law jurisdictions.¹³⁶ According to Sir Anthony Mason:

The principal reason why the European system has attractions for some critics of the adversarial system is that control lies more in the hands of the judges and because the European courts are said to have as their object the investigation of the truth. Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties.¹³⁷

¹³⁵ Mauro Cappelletti, above n 32.

¹³⁶ For present purposes, the terms adversarial and inquisitorial are intended to refer only to the predominant nature of the judicial process in a given system, as opposed to the structure of that legal system.

¹³⁷ Mason, 'The Future of Adversarial Justice', above n 43.

In the continental system judges typically manage trial proceedings and engage in fact-finding (inquisition) so as to obtain an ‘accurate and fair’ representation of the facts.¹³⁸ In adversarial systems, on the other hand, it is the litigants themselves who manage the trial process through the presentation of arguments designed to persuade the court or judge as to the veracity of their version of the facts.¹³⁹ Active judicial involvement in the adversarial trial process by way of questioning is traditionally prohibited. This restrictive view of the judicial role has formed the sub-strata of common law procedural theory for the majority of its history. As Denning LJ famously remarked in *Jones v National Cole Board*:

In the system of trial we have developed in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries ... The judge's part ... is to hearken to the evidence ... If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate, and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: ‘Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.’¹⁴⁰

Because it is a judge’s job to ‘hearken to the evidence’, an adherence to the principles of procedural fairness (and judicial impartiality in particular) has been deemed critical to ensure the legitimacy of judicial decision-making in the adversarial model. In

¹³⁸ Alison Creighton, ‘An Adversarial System: A Constitutional Requirement?’ (1999) 74 *Reform* 64, 64; Mark Nolan ‘The Adversarial mentality versus the Inquisitorial mentality’ (2004) 16(3) *Legaldate* 7, 7.

¹³⁹ Alison Creighton, above n 138.

¹⁴⁰ *Jones v National Cole Board* [1957] 2 QB 55, 65.

contrast, these principles are theoretically redundant in civil law. As Alison Creighton has explained:

In civil law countries such as France and Germany, fairness is inherent in the system. A judge who conducts the investigation, assists the parties to clarify the issues and pleadings or questions the witnesses is not necessarily proceeding unfairly. However, in an adversarial system, to be fair, a judge must be independent of the State, be impartial, and be seen to be impartial. Procedural fairness is also preserved through party control of investigation and proceedings. These are elements that an adversarial system seeks to uphold.¹⁴¹

The differences between inquisitorialism and adversarialism are often over stated,¹⁴² and may encourage inaccurate assumptions to be drawn regarding the nature and uniformity of the judicial role throughout the various continental and common-law style systems.¹⁴³ In reality, the judicial role is not defined solely by the classification of the system within which it operates, but also by various constitutional, political, and social influences unique to each legal system:¹⁴⁴

¹⁴¹ Creighton, above n 138, 6.

¹⁴² Mason, 'The Future of Adversarial Justice', above n 43; Felicity Nagorcka, Michael Stanton and Michael Wilson, 'Stranded between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice' (2005) *Melbourne University Law Review* 14. Justice Geoffrey Davies, 'The reality of civil justice reform: why we must abandon the essential elements of our system' (Paper presented at the 20th Australian Institute of Judicial Administration Annual Conference, Brisbane, 13 July 2002) 2; Justice David Ipp, 'Judicial Intervention in the Trial Process' (1995) 69 *The Australian Law Journal* 365, 368; Mirjan Damaška, 'Structures of Authority and Comparative Criminal Procedure' (1975) 84 *Yale Law Journal* 480, 481.

¹⁴³ Bronitt and Mares, 'The History and Theory of the Adversarial and Inquisitorial Systems of Law' (2004) 16(3) *Legaldate* 1; Nolan, above n 138.

¹⁴⁴ Taylor and Pryles, 'The Cultures of Dispute Resolution in Asia', in Michael Pryles (ed), *Dispute Resolution in Asia* (1997), 3; Sackville, 'Courts in Transition: An Australian View', above n 70, 4.

In the legal systems of today there is no pure example of either the civil law or common law system. All relevant legal systems in the western world are to greater or lesser degrees hybrids of these two models or of other legal families.¹⁴⁵

In most continental style systems, for example, ‘it is only in criminal law that we can truly speak of an inquisitorial system,’¹⁴⁶ and inquisitorial techniques have long been common to various ancillary civil and criminal legal processes in common law countries such as Australia.¹⁴⁷ Moreover, even if it was once the case that common law judges merely sat to ‘hear and determine the issues raised by the parties,’¹⁴⁸ modern case management systems no longer permit judges to remain so detached from proceedings. There would also appear to be an increasing willingness on the part of common law judges to intervene in the civil trial process in certain circumstances, whether as a matter of case management or simply in the interests of justice. As Kirby P (as he then was) explained:

It has become more common for judges to take an active part in the conduct of cases than was hitherto conventional. In part, this change is a response to the growth of litigation and the greater pressure of court lists ... In part, it arises from a growing appreciation that a silent judge may sometimes occasion an injustice by failing to reveal opinions which the party then affected has no opportunity to correct or modify. In part, it is simply a reflection of the heightened willingness of judges to take greater control of

¹⁴⁵ Colbran et al, above n 91, 16.

¹⁴⁶ Antoine J Bullier, ‘How the French Understand the *Inquisitorial System*’ (2001) 29 *Australian Institute of Administrative Law Forum* 40, 41; Nagorcka, Stanton and Wilson, above n 142.

¹⁴⁷ Examples include coronial inquests, parole board inquiries, and ‘a range of tribunal systems other than the Australian criminal and civil courts’. Nolan, above n 138.

¹⁴⁸ *Jones v National Cole Board* [1957] 2 QB 55, 65 (Denning LJ).

proceedings for the avoidance of injustices that can sometimes occur from undue delay or unnecessary prolongation of trials.¹⁴⁹

While the differences between continental and adversarial systems should not be embellished, there is evidence to suggest that the former are generally less susceptible to excessive costs and delays than the latter.¹⁵⁰ German courts in particular have a reputation for efficiency, accessibility, and low costs.¹⁵¹ There are numerous possible explanations for the low costs associated with adjudication in Germany, many of which are unrelated to the conduct of judges.¹⁵² One general distinguishing feature between common law and civil law judges, however, which may increase efficiency and reduce costs, is the active role of civil law judges in the trial process, and in particular the promotion of settlement. Indeed, according to Tania Sourdin there is no doubt

that when English, American and other non-Continental jurisdictions began to collapse under their own weight there was a concerted move towards the adoption of Continental, interventionist judging techniques [such as the promotion of settlement] that had previously been the mainstay of non-adversarial jurisdictions.¹⁵³

¹⁴⁹ *Galea v Galea* (1990) 19 NSWLR 263, 281–82 (Kirby P)

¹⁵⁰ Héctor Fix-Fierro, *Courts, Justice and Efficiency: A Socio-legal Study of Economic Rationality in Adjudication* (2003).

¹⁵¹ Alexander, Gottwald and Trenczek, above n 127.

¹⁵² Ibid. The authors identify a number of reasons for the accessibility and low cost of the German court system, including the wider availability of ‘legal costs insurance and legal aid’, and the fact that litigation costs are based on ‘a percentage of the value of the dispute’ as opposed to an hourly rate. Another factor may be the tendency in civil law courts to develop specialist courts as opposed to courts of general jurisdiction as in common law (although, as noted above, certain Australian jurisdictions now do this as well), and the absence of a ‘single trial event’. See James G Apple and Robert P Dyling, *A Primer on the Civil Law System*, 37.

<[http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf)> at 14 October 2009.

¹⁵³ Sourdin, ‘Judicial Management and Alternative Dispute Resolution Process Trends’, above n 4, 187.

In Denmark and Norway, for example, the majority of civil disputes have been channelled through the *forliksråd* ('settlement council' in 'Old Norwegian') since 1795¹⁵⁴ and 1797 respectively.¹⁵⁵ The *forliksråd*, which is essentially a council staffed by elected local officials, remains the court of first instance for all interest-based industrial actions in Denmark¹⁵⁶ and for all civil disputes in Norway where the dispute regards a monetary sum (or can be calculated as a sum) of less than NOK 125000 (AUD 25000).¹⁵⁷ In Denmark, *forliksråd* is now formally referred to as *Statens Forligsinstitution* ('conciliation board'), and in Norway the current official translation of *forliksråd* is 'conciliation council'. This subtle change in designation reflects the fact that, although these councils have the power to make judgments on certain matters, their role is predominantly non-determinative in nature. Although conciliation boards/councils remain the first port of call in most civil matters, the extent to which they may be considered 'judicial' (in a common law sense) is debatable, as they are staffed not by tenured judges but elected officials. Thus, any comparisons between *forliksråd*, *Statens Forligsinstitution* and common law prehearing processes should be made with caution. Nevertheless, it would appear that these settlement council's directly influenced the development of settlement conferencing in the US during the 1920's and 1930's and that, as such, the 'the adoption of Continental, interventionist judging techniques' began long before

¹⁵⁴ *Forordning om Forligelses-Commissioners Stiftelse overalt i Danmark, samt i kjøbstæderne i Norge 1795* (Denmark/Norway) ('Act about the Settlement Council everywhere in Denmark, as well as in Cities in Norway')

¹⁵⁵ *Forordning om Forligelses-Indretninger paa Landet i Norge 1795* (Norway) ('Act about the Settlement Councils in the Country in Norway'). The 1795 Danish/Norwegian Act extended to Norwegian cities, but rural areas were not included in Norway until 1797. This was prior to the ceding of Norway to Sweden, and Norway's subsequent declaration of independence in 1814.

¹⁵⁶ *Lov om mægling i arbejdsstridigheder* (the 'Public Conciliator Act') 1910 (Denmark).

¹⁵⁷ *Twisteloven 2008* ('Civil Litigation Act') (Norway), Chapter 6. The legal foundation for the *forliksråd* as an institution is now *Domstolloven* (the Court's Act) 1915 (Norway) ss 1, 27.

perceptions of a crisis in civil justice sparked the access to justice reforms implemented from the 1970's onward.¹⁵⁸

The obligation to seek settlement (as opposed to the option to do so) also has 'a long tradition in Germany and other civil law countries'.¹⁵⁹ Indeed, this obligation is now recognised in s 278 of the *German Code of Civil Procedure*. In contrast, according to Alexander, Gottwald and Trenczek, 'no such legal requirement exists in common law jurisdictions, although judicial attempts to encourage parties to settle may occur in some common law jurisdictions as a matter of case management practice rather than law'.¹⁶⁰ This statement holds true in Australia, insofar as Australian judges are never positively obliged to seek settlement prior to or during trial.¹⁶¹ Recent procedural amendments in the Family Court and the Federal Magistrates Court nevertheless engage judges in the provision of less adversarial (or inquisitorial) trials, which go beyond the provision of traditional case management techniques, and ostensibly generate a trial process in which judges are effectively able to promote settlement in a manner comparable with judges in certain civil law jurisdictions.¹⁶² These procedures are the focus of the following section.

¹⁵⁸ Galanter, 'The Emergence of the Judge as a Mediator in Civil Disputes', above n 36, 258.

¹⁵⁹ Alexander, Gottwald and Trenczek, above n 127, 250. Other civil law systems encourage the early promotion of settlement but do not typically oblige judges to pursue it. For example, the *Quebec Civil Code of Civil Procedure* provides judges at 'every level and in virtually every area of law'¹⁵⁹ with the power to preside over a 'settlement conference' at the request of the parties: *Quebec Civil Code of Civil Procedure*, RSQ 2009 c-25.

¹⁶⁰ Alexander, Gottwald and Trenczek, above n 127, 250.

¹⁶¹ Ibid. As the authors point out, however, it is common for judges to divert disputes to non-adjudicative processes 'where appropriate'. See, eg, the Family law (*Shared Parental Responsibility*) Act 1996, s 697Q (f).

¹⁶² The Family law (*Shared Parental Responsibility*) Act 1996 (Schedule 3), and the *Federal Magistrates Act 1999*.

Less Adversarial Trials

An early example of a less adversarial trial process was introduced in 1998 in the NSW Children's Court. S 93 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the '*CYP Act (NSW)*') states that proceedings before the Children's Court are 'not to be conducted in an adversarial manner', and s 93 (2) states that proceedings 'are to be conducted with as little formality and legal technicality and form as the circumstances of the case permit'. One of the most significant features of the *CYP Act (NSW)* (in terms of fostering a less adversarial trial process) is the purported exclusion of evidential rules by s 92 (3):

The Children's Court is not bound by the rules of evidence unless, in relation to particular proceedings or particular parts of proceedings before it, the Children's Court determines that the rules of evidence, or such of those rules as are specified by the Children's Court, are to apply to those proceedings or parts.

One year after the introduction of the *CYP Act (NSW)*, the Commonwealth Parliament introduced the *Federal Magistrates Act 1999*, s 42 of which states that in 'proceedings before it, the Federal Magistrates Court must proceed without undue formality and must endeavour to ensure that the proceedings are not protracted'. Section 63 also provides the Federal Magistrates Court with the power to question witnesses in certain circumstances; a hallmark of inquisitorialism. Unlike the *CYP Act (NSW)*, however, the *Federal Magistrates Act* does not attempt to curtail the application of evidential rules.

A more recent legislative example of less adversarial trials is contained in the new Pt VII of the *Family Law Act 1975* (Cth), as amended by Schedule III of the *Family Law (Shared Responsibility) Act 2006* (Cth). The procedures enshrined in Pt VII are colloquially referred to as the less adversarial trial (or ‘LAT’) process,¹⁶³ and apply in all ‘child-related proceedings’¹⁶⁴ (or any other proceedings to which the parties consent)¹⁶⁵ within the Commonwealth family law jurisdiction. The LAT process essentially mirrors the procedures established by the *CYP Act (NSW)* at the federal family law level, and shares many commonalities with these procedures as a result.

The LAT process itself is not formally prescribed by statute, but is enabled by a number of discretionary powers conferred by the revised Pt VII. Section 697N establishes five ‘principles for conducting child-related proceedings,’¹⁶⁶ to which the court is to have ‘regard’ when applying the LAT process. In particular, the court is to ‘actively direct, control and manage the conduct of the proceedings’,¹⁶⁷ and, ‘without undue delay and with as little formality, and legal technicality and form, as possible’.¹⁶⁸ These principles are supplemented by eight ‘general duties’¹⁶⁹ and three ‘powers,’¹⁷⁰ which are comparable in many respects to the orders available to judges during prehearing conferences. S697 Q states that a judge ‘must:’¹⁷¹

¹⁶³ This is the expression currently adopted by the Family Court. See, for example; Margaret Harrison, ‘Finding a better way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings’ (April 2007).

<http://www.familycourt.gov.au/wps/wcm/resources/file/ebc70645b58cf92/Finding_Better_Way_April_2007.pdf> at 14 October 2009.

¹⁶⁴ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 697M (1).

¹⁶⁵ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 697M (5).

¹⁶⁶ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 69ZN.

¹⁶⁷ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 697N (4).

¹⁶⁸ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 697N (7).

¹⁶⁹ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 69ZQ.

¹⁷⁰ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 69ZR.

¹⁷¹ Although the *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 697 Q states that judges ‘must’ carry out the duties set out therein, a failure to do so does not invalidate an order hence the duties are essentially discretionary.

- (a) decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily; and
- (b) decide the order in which the issues are to be decided; and
- (c) give directions or make orders about the timing of steps that are to be taken in the proceedings; and
- (d) in deciding whether a particular step is to be taken—consider whether the likely benefits of taking the step justify the costs of taking it; and
- (e) make appropriate use of technology; and
- (f) if the court considers it appropriate—encourage the parties to use family dispute resolution or family counselling; and
- (g) deal with as many aspects of the matter as it can on a single occasion; and
- (h) deal with the matter, where appropriate, without requiring the parties' physical attendance at court.

In addition, and analogous to the *Children and Young Persons (Care and Protection) Act 1998* (NSW), the LAT process excludes the application of various evidentiary provisions ordinarily imposed by the Commonwealth *Evidence Act 1995* unless the court so directs.¹⁷² When these provisions of the *Evidence Act* are not applied, the court itself may make such directions and/or orders as it sees fit in relation to the admission and timing of evidence.¹⁷³ Presumably in an attempt to remove any doubt as to the object of the exclusion, Pt VII clarifies that the exclusion of the aforementioned provisions of the *Evidence Act* does not 'revive the operation of a

¹⁷² Section 697T of the *Family Law (Shared Parental Responsibility) Amendment Act 2006* excludes: (a) Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41; (b) Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections); (c) Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).

¹⁷³ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 697X.

rule of common law ... or a law of a State or territory'.¹⁷⁴ Thus, it would appear that any common law rules of evidence subsumed within the *Evidence Act* are not intended to be reinstated to fill the vacuum created by Pt VII.¹⁷⁵ The removal of formal evidential rules represents a significant step towards the inquisitorial model in which judges request evidence, as opposed to determining the admissibility of evidence presented by counsel.¹⁷⁶ According to the Commonwealth Attorney-General's Department, during the LAT process,

the judge operates extremely differently from the way a judge would normally do in a superior court of record. The judge very much determines the way the proceedings will run, what evidence will be presented, how that evidence will be presented and when it will be presented.¹⁷⁷

As noted earlier, and discussed in more detail below, it is impossible to confirm whether judges do in fact operate 'differently' during the LAT process, but it was clearly the intention of Parliament that they should. Indeed, the Family Court of Appeal has itself stated that 'the changes brought about by the LAT process not only authorise but positively encourage judges to depart further still from the adversarial model'.¹⁷⁸ In a sense, then, the LAT process might be described as an expanded form of case management; reflecting the fact that both concepts derive from continental

¹⁷⁴ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 697T (5).

¹⁷⁵ It is worth noting, however, that the provisions of the *Evidence Act 1995* that the LAT process purports to exclude may already be waived in ordinary civil proceedings by virtue of s 190 of the *Evidence Act*, if 'The parties to the proceedings consent', if 'the matter to which the evidence relates is not genuinely in dispute', or if 'the application of those provisions would cause or involve unnecessary expense or delay'.

¹⁷⁶ According to the Revised Explanatory Statement to the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*, 70, 'the waiving of the specified provisions of the Evidence Act is an integral element of the active judicial management necessary to achieve less adversarial court processes'.

¹⁷⁷ Commonwealth, Evidence to House Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, Canberra, 4 July 2005, 26-29 (Kym Duggan, Assistant Secretary, Family Law Branch, Attorney-General's Department), 27.

¹⁷⁸ *Truman v Truman* (2008) 216 FLR 365, 7 (Bryant CJ, Kay and Thackray JJ).

style judging techniques.¹⁷⁹ However, the LAT process represents an expansion upon existing case management systems insofar as judges applying the LAT process may ‘make determinations, findings and orders at any stage of proceedings’.¹⁸⁰ Case management systems, on the other hand, are generally confined to the management of litigation prior to the final hearing. Moreover, the making of a determination, finding or order does not exclude the judge who made it from ultimately determining the dispute.¹⁸¹ Thus, a judge may notionally instruct the parties (before any evidence has been presented) that he/she has determined an issue in argument (such as, for example, ‘allowing a child to leave the jurisdiction during the course of the proceedings’)¹⁸² before later making a final determination as to the ultimate issue (such as, for example, a parenting order).¹⁸³ This is in direct contrast to the format predicted (although not, as will be seen, endorsed) for judicial mediation, discussed in the following Chapter.

It is important to note, however, that although the LAT process notionally applies during the final hearing, it does not apply automatically in all family law proceedings. During the passage of the LAT process through the House of Representatives, the Commonwealth Attorney General’s department provided evidence to the House Legal and Constitutional Affairs Committee that the ‘more inquisitorial ... approach to decision-making [may not constitute] an exercise of judicial power under the

¹⁷⁹ Sourdin, ‘Facilitative Judging’, above n 13, 77.

¹⁸⁰ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 697R.

¹⁸¹ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 697R (3).

¹⁸² In *Truman v Truman*, [2008] FamCAFC 4, [93]–[94], the Family Court of Appeal confirmed that decisions ‘of great importance may therefore be made at the early or intermediate stages ... It is also important to keep in mind that orders made during the early and intermediate stages of a LAT are not restricted to interim orders made pending a final determination. They may be the final decision in a matter of importance – for example, allowing a child to leave the jurisdiction during the course of the proceedings’.

¹⁸³ *Family Law Act 1975*, s 60cc. In order to determine a child’s best interests in respect of a parenting order, a judge may take into account a variety of factors including a ‘child’s wishes’ (s 60cc 3(a)).

Constitution'.¹⁸⁴ In order to mitigate these uncertainties, the *Amendment Act* draws a distinction between 'child related proceedings'¹⁸⁵ and 'other proceedings'.¹⁸⁶ While the LAT process applies automatically to child-related proceedings, it only applies to 'other proceedings' with the consent of the parties – which may be obtained during a case-assessment conference¹⁸⁷ or a prehearing procedural hearing.¹⁸⁸ This differential treatment is predicated on the understanding that 'in the special context'¹⁸⁹ of child-related proceedings (in which a child's 'best interests' are the paramount consideration) the court 'is performing a different function than it would be if it was making a determination as to [for example] a property settlement', and that the procedural rights of litigants do not therefore arise.¹⁹⁰ The accuracy of this presumption may be doubted in light of recent case law, in which the Family Court of Appeal appears to have ignored any such distinction.¹⁹¹ In *Crestin v Crestin*, a Full Court of the Family Court stated that:

Whatever process for adjudication of cases is adopted by the Court, procedural fairness must be accorded to the parties ... The process adopted in the LAT, particularly on Day 1, gives no warrant to compromise issues of fairness and the usual requirements must be met. These are that

¹⁸⁴ Commonwealth, Evidence to House Standing Committee on Legal and Constitutional Affairs, above n 177, 26.

¹⁸⁵ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 697M (1).

¹⁸⁶ *Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 697M (5). According to the Attorney General's department, the LAT process does not apply automatically to non child-related proceedings, as whether the 'extension of the less adversarial provisions to other proceedings under the Act, such as property proceedings which involve the more usual judicial role of adjudicating on existing rights and altering those rights [*would be a legitimate exercise of Ch III power*], is more open to doubt ... [T]his is why the less adversarial approach will only apply to such proceedings by consent'. Commonwealth, Evidence to House Standing Committee on Legal and Constitutional Affairs, above n 177, Attachment 3 (Précis of Advice Received from the Australian Government Solicitor).

¹⁸⁷ *Family Law Rules 2004*, r 12.03.

¹⁸⁸ *Family Law Rules 2004*, r 12.04.

¹⁸⁹ Commonwealth, Evidence to House Standing Committee on Legal and Constitutional Affairs, above n 177, Attachment 3 (Précis of Advice Received from the Australian Government Solicitor).

¹⁹⁰ *Ibid.*

¹⁹¹ *Truman v Truman* (2008) 216 FLR 365; *Crestin v Crestin* (2008) 39 Fam LR 420.

determinations be made impartially, on the basis of all relevant material that the parties were able to put before the trial judge, without any pre-judgment and that the parties were given an adequate opportunity to be heard.¹⁹²

Thus, while the removal of evidential rules and the clear parliamentary intention that judges should ‘depart further still from the adversarial model’¹⁹³ might appear to undermine procedural fairness, the Family Court has read own the provisions of the LAT process in favour of validity. Were a discretion provided by the LAT process to be exercised in a non-judicial manner, therefore, that exercise would flow not from the vesting of a non-judicial function in the court but from the court’s own failure to exercise that discretion in accordance with judicial power and the implications of Ch III.

Concurrent Expert Evidence (‘Hot-Tubbing’)

One final development associated with inquisitorialism deserves mention. Various Australian courts, including the Federal Court and the NSW Supreme Court¹⁹⁴ now provide for the provision of concurrent expert evidence as an aspect of case management. Colloquially referred to as ‘hot-tubbing’, concurrent expert evidence is a process in which judges facilitate discussions between competing expert witnesses. The catalyst for hot-tubbing is the age-old concern that expert witnesses may in effect

¹⁹² *Crestin v Crestin* (2008) 39 Fam LR 420; citing *Re Ludeke; Ex parte Customs Officers Association of Australia* (1985) 155 CLR 513; *Re: JRL; Ex parte CJL* (1986) 161 CLR 342; *J v Lieschke* (1987) 162 CLR 447.

¹⁹³ *Truman v Truman* (2008) 216 FLR 365, [7] (Bryant CJ, Kay and Thackray JJ).

¹⁹⁴ *Supreme Court Rules 1970* (NSW) Pt 36, r 13CA.

become the 'hired champion of one side'.¹⁹⁵ As Lord Woolf lamented in his Final Report on access to justice:

Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.¹⁹⁶

In Australia, concurrent expert evidence was pioneered by the Australian Competition Tribunal (ACT),¹⁹⁷ and has since been adopted in the Administrative Appeals Tribunal (AAT).¹⁹⁸ Neither the ACT nor the AAT are bound by common law rules of evidence, thus the extent to which hot-tubbing in these administrative tribunals is comparable to the process adopted in Ch III Courts is uncertain.¹⁹⁹ However, Justice John Mansfield has described hot-tubbing in the Federal Court as follows:

¹⁹⁵ Learned Hand, 'Historical and Practical Considerations Regarding Expert Testimony', (1901) 15 *Harvard Law Review* 40.

¹⁹⁶ Woolf, above n 20, 183.

¹⁹⁷ Justice Ronald Sackville, 'Expert evidence in the managerial age' (Paper presented to the Forensic Accounting Conference, Sydney, 14 March 2008).

¹⁹⁸ *Administrative Appeals Tribunal Act 1975* s 33(1).

¹⁹⁹ Justice Downs has described the concurrent expert evidence procedure in the AAT as follows: 'Expert witnesses should arrive in time to confer before evidence is taken; The Tribunal welcomes and swears the expert witnesses; At the outset of the expert evidence, the Tribunal summarises orally, or in writing, the agreed and disagreed facts; The applicant's expert witness gives a brief oral exposition; The respondent's expert witness then gives a brief oral exposition; Alternatively, the Tribunal may proceed to ask questions of the expert witnesses; The respondent's expert is invited to ask the applicant's expert witness questions, without the intervention of counsel; The process is then reversed, so that a brief colloquium takes place; Each expert witness is invited to give a brief summary (including his or her view on what the other expert has said and identifying areas of agreement and disagreement); The parties' representatives may then ask any relevant or unanswered questions of the expert witnesses. At any appropriate time in the process the Tribunal may intervene and ask questions'. Justice Garry Downs, 'Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience' (Paper presented at the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004). The Trade Practices Tribunal outlined a similar process in *Re Queensland Independent Wholesalers Ltd* (1995) 132 ALR 225, 232.

In essence, concurrent evidence involves the collaboration of experts to identify the key issues in dispute at a pre-hearing stage followed by the concurrent examination of experts at trial, ensuring all parties have an opportunity to respond to the opinions and concerns raised by the experts.²⁰⁰

In the Federal Court, hot-tubbing is supported by a Practice Direction (which advises expert witnesses of their obligations)²⁰¹ and O 34A of the *Federal Court Rules* which allow judges to direct expert witnesses where two or more witnesses are to present evidence on the same issue,²⁰² and to require evidence to be given by experts concurrently.²⁰³ The resultant process constitutes an alternative means of facilitating informed judgment, and is unlikely to interfere with procedural fairness in a manner comparable with judicial mediation. As intimated earlier and demonstrated further in Chapter 8, judicial mediation is also likely to take place exclusively during prehearing, and in a process generally divorced from the formal rules of trial evidence. As such, the relevance of hot-tubbing in the present context is merely contextual; reinforcing the proposition that Australian judges have gained increasing control over the civil trial process.

Third-wave Comparisons

There are obvious parallels and overlaps between the growth of ADR and the development of case management (including less adversarial trials).²⁰⁴ At the most basic level, these trends share a number of common values and objectives stemming

²⁰⁰ Justice John Mansfield, above n 119, 18-19.

²⁰¹ Practice Direction, 'Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia, Version 6 (5th May 2008).

²⁰² *Federal Court Rules 1979* (no. 140 as amended), O 34A r 3(2).

²⁰³ *Federal Court Rules 1979* (no. 140 as amended), O 34A r 3(2)(i).

²⁰⁴ As noted above, the LAT process can be described as an expansion upon existing case management principles, and for the purposes of the immediate analysis these concepts can be adjoined.

from perceived deficiencies in the traditional legal process and, more directly, the large body of theory developed in the wake of the Pound Conference and the Florence Project.²⁰⁵ As illustrated in Chapter 1, these objectives can be generally defined in quantitative efficiency terms such as a reduction in litigation costs and increased settlement rates (the cool theme).²⁰⁶ The underlying values supported by ADR are also broadly compatible with case management. One value commonly attributed to mediation, for example, 'is its responsiveness to client needs and interests'.²⁰⁷ Mediators are able to respond directly to the interests of the parties as they are not bound by rigid rules and procedures. Similarly, case management allows judges to provide a level of individualised justice via a framework of broad procedural discretions (the warm theme).²⁰⁸ Case management systems also provide the 'source of power' from which court-connected ADR services are ordered or encouraged.

On the other hand, while ADR and case management are generally credited with reducing the adversarial nature of proceedings, the manner in which they do so differs. Case management serves non-adversarial values by increasing judicial control of the trial process and by relaxing rules of procedure and evidence.²⁰⁹ ADR processes also typically rebuke formal rules of procedure and evidence, and serve non-adversarial values by seeking to reduce the competitive nature of proceedings. However, increased third-party control is at odds with the notion of 'self determination and party autonomy', which is promoted in certain forms of ADR (including mediation)

²⁰⁵ By way of contrast, as discussed in the following Chapters, the objectives of the common law judicial function stem primarily from underlying constitutional concepts such as the separation of powers doctrine and the rule of law values which it serves.

²⁰⁶ Laurence Boule identifies five mediation objectives; 'effectiveness in achieving settlement', 'efficiency', 'accessibility', 'individual and relationship transformation', and 'social transformation', above n 6, 69-74.

²⁰⁷ Ibid 63.

²⁰⁸ Atiyah, above n 86, 430.

²⁰⁹ Astor and Chinkin, above n 6, 238.

‘by allowing the parties scope to take control of their dispute through direct participation’.²¹⁰ Put simply, case management advocates an increase in judicial control over the process, ADR encourages a combination of party and third-party control over process, and adversarialism assumes that the parties control the process. It follows that care must be taken to avoid unwarranted comparisons between ADR and case management when asking *how* (if at all) the adversarial process has evolved.

Structural commonalities can also be identified in the various processes analysed in the preceding section. Prehearing conferences, settlement conferences and the LAT process are all implemented by the provision of broad discretionary powers. This is so whether (as in the case prehearing hearings and settlement conferencing) a single broad discretion leaves the process to be adopted entirely in the hands of judges, or whether (as in the case of the latter) a series of smaller discretions are implemented in place of more formal, prescriptive trial procedures. The same is true in the US. According to James Wall et al, rules of court in the US will generally provide no ‘guidance relative to formal procedures’ to be adopted by judges in the settlement process, and

almost all judicial techniques used during the settlement process are off the record either because there are no stenographers or recording devices at the pretrial or settlement conferences, or because judges seldom allow their overtures to become part of the court record.²¹¹

²¹⁰ Boulle, above n 6, 65.

²¹¹ Wall, Schiller, and Ebert, ‘Should Judges Grease the Slow Wheels of Justice?’, above n 59, 89.

Thus, in Australia as in the US, it is through the increase in procedural discretionary power, and the expansion of prehearing events, that lawmakers have sought to stimulate change in the judicial process. As more and more judicial work migrates away from the final hearing, it becomes subject to fewer and fewer formal procedures. The next question, therefore, is whether the increase in discretionary power and the proliferation of prehearing processes *has* in fact led to a transformation of the Australian judicial function.

Has the Australian Judicial Function been ‘Transformed’?

In *Johnson v Johnson*, the High Court expressed the view that:

The rules and conventions governing ... [judicial] practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.²¹²

The High Court’s jurisprudence is replete with similar views.²¹³ However, and as intimated earlier, it is impossible to authoritatively establish a trend towards greater judicial control of the Australian litigation process. The perennial difficulty, supported by the preceding analysis, is that while ‘a judge’s role in dispensing justice is usually specifically defined, a judge’s role in the settlement of disputes is often determined by

²¹² (2000) 201 CLR 488.

²¹³ In Kirby J’s view, for example, although “‘some form of case management has always existed”, the role of judges in Australia has increased greatly in recent years. Such functions are now regarded as a necessary and orthodox part of the judicial function’. *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 168-69.

that judges own conceptions of his or her role in the settlement process'.²¹⁴ The extent to which the objectives of case management are implemented therefore depends in no small measure upon what individual court officials and judges actually do within the framework provided (as opposed to what that framework ostensibly allows or requires). As John Langbein has noted (from the perspective of the IDS case management scheme operated in the US Federal Court):

The litigant gets managerial judging only if, by the fortuity of the case-assignment wheel, he draws a managerial judge ... If you draw a traditional federal district judge, you get old style adversary domination of the pre-trial process.²¹⁵

Even among court officials and judges who are 'management minded', some are likely to take a broader view of the means by which case management objectives may be realised than others. To determine whether Australian judges control the progress of civil litigation more than they did, say, 50 years ago, would therefore require some measurable criteria of past and present judicial attitudes and behaviour, and this kind of data cannot be gathered reliably post hoc (if at all). Thus, while the near universal adoption of court-connected ADR, case management systems and the recent introduction in Australia of so-called 'less adversarial trials'²¹⁶ may ostensibly demonstrate an increase in judicial control of the civil trial process, whether this is in fact the case is difficult to establish conclusively. Put differently, there may be an

²¹⁴ DeGaris, above n 30, 217.

²¹⁵ John Langbein, 'The German Advantage in Civil Procedure' (1985) 52(4) *University of Chicago Law Review* 823, 860-61.

²¹⁶ *Family Law (Shared Parental Responsibility) Amendment Act 2006*.

immeasurable divergence between what courts and judges are or were ‘supposed’ to do, and what, in practice, they actually do or did.²¹⁷

Hugh Landerkin and Andrew Pirie have argued that the US *Federal Rules of Civil Procedure 1983* (which encourage greater judicial control over prehearing procedures), ‘most likely [represent] the way it has always been within legal systems, and therefore the United States Federal Court system is but an exemplar of this reality’.²¹⁸ This would also appear to be true of judicial practice in the Australian Federal Court. According to Justice Bryan Beaumont:

In practice the [Federal] court has accepted, from its establishment under Chief Justice Bowen in 1977, that there is no laissez-faire option: the size and complexity of litigation brought to the court for resolution is such that a fair, but firm, control of every stage of proceedings in each matter is essential if litigation is to be properly dealt with.²¹⁹

This does not necessarily mean, of course, that judicial practice and attitudes have not changed in the Federal Court since its inception. Nor does it mean that the promotion of settlement has always had wide-spread judicial support. As noted above, Justice Andrew Rogers expressed the view in 1987 that Australian ‘judges have refrained from the [settlement] role accepted by their Brethren in the United States.’²²⁰ In 1994, Annesley DeGaris conducted a survey of Federal Court judge’s attitudes towards

²¹⁷ This difficulty was well expressed by Herbert Kritzer: ‘[The] discussion suggests that proposals for the judge to become more actively involved in the non-adjudicative aspects of adjudication would sharply alter the traditional role of the judge. But this assumes that the proposed changes do in fact represent changes’. Kritzer, above n 53.

²¹⁸ Landerkin and Pirie, above n 37, 266.

²¹⁹ Beaumont, above n 76, 163.

²²⁰ Rogers, ‘Judges in Search of Justice’, above n 128.

their role in the production of settlement.²²¹ While the survey data is also now relatively old, it provides empirical support for the proposition that the judicial role has evolved. Annesley DeGaris found that:

In general, Federal Court judges do not perceive a prominent role for themselves in the settlement process, nor do they perceive that they have no role at all. They state, however, that compared to 20 years ago, they are more involved in the settlement process When asked whether they would favour legislation increasing their role in the settlement process 53 % answered 'no' and 27 % were 'not sure'.²²²

Moreover, Annesley DeGaris found that 'some judges favour an increased role in the settlement process', and observed that judges were more likely to facilitate than to evaluate:

73 % of judges feel that they should not become *involved* in the settlement process unless asked by the parties. However, 60% state that a judge should attempt to *facilitate* a settlement although not asked to do so by either party. The distinction between these seemingly contradictory findings appears to be based on the use of the word 'involved' (implying participation) ... and the word 'facilitate' (implying encouragement). Thus ... Federal judges are willing to encourage or facilitate settlement, but do not feel that they should participate or become involved [substantively] in settlement discussions.²²³

²²¹ DeGaris, above n 30, 225.

²²² Ibid 225.

²²³ Ibid 225-26.

This finding mirrors the US studies outlined above, and is highly significant in the current context. As pointed out in Chapter 1, the classic mediation model is ideologically facilitative (not evaluative) in nature. If Annesley DeGaris' interpretation of the survey data is correct, then (even as long ago as 1994) a majority of Federal Court judges would have viewed a facilitative mode of judicial mediation as an appropriate exercise of judicial power. Indeed, Annesley DeGaris quoted one judge (who 'best summarised' the majority view) as saying that:

I think that all Australian judges, certainly all members of this Court, are very much aware of the desirability of parties achieving settlements. The policy which I adopt is to foster the idea of settlement discussions as an when this seems appropriate. In some cases it will be entirely pointless; it may be obvious that there is a substantial issue which has to be resolved by a court. In other cases the parties may be sophisticated and well represented; an enquiry or hint from time to time may be useful, but anything more may be counter-productive. In other cases ... more direct intervention may be justified. I am not adverse [*sic*] to saying quite bluntly that I think that the parties ought to become more involved in negotiations. However, I would never get involved with the details of those negotiations except with the consent of the parties and having first informed them that I would regard myself as being disqualified from hearing the case if it in fact proceeds.²²⁴

Annesley DeGaris' survey remains the only one of its kind in Australia, but numerous anecdotal reports can be cited to the effect that Australian judges attempt to facilitate settlement between disputants. In a recent article, Chief Justice French personally

²²⁴ DeGaris, above n 30, 228-29.

recalled utilising O 27 of the *Federal Court Rules* (that parties seek leave before a subpoena may be issued)²²⁵ as a mechanism to facilitate negotiations between the parties:

In some cases of a complex nature, I have invited the potential respondents to subpoenas to be present at the leave application in order that there may be sensible negotiation of the scope of documents being sought, the way in which they may be produced and any confidentiality conditions that may be necessary.²²⁶

ADR commentators have made similar observations. Laurence Boulle has concluded that ‘judges ... often attempt to promote compromises between the parties, either by suggesting or intimating that they attempt to negotiate a settlement or by constructing orders which give something to each side,’²²⁷ and Tania Sourdin has stated that:

Judges may use facilitative processes when encouraging settlement – these may vary from a discussion of the ‘issues’ and a suggestion that settlement be attempted to judges providing a preliminary view (an evaluation) on issues that have been raised and the evidence that may be required. Other judges may use facilitative processes and techniques of summary and reframing when conducting concurrent evidence (‘hot tub’) processes or when involved in specialist ‘problem-solving’ courts.²²⁸

²²⁵ *Federal Court Rules 1979* (no. 140 as amended).

²²⁶ French, above n 83, 9.

²²⁷ Boulle, above n 6, 132.

²²⁸ Sourdin, ‘Facilitative Judging’, above n 13, 66.

Whether or not the judicial function in Australia has or has not actually *evolved*, therefore, it seems reasonable to conclude that Australian judges do regularly engage in facilitative processes (and to a lesser extent evaluative processes) with a view to securing settlement. Of course, this fact alone does not necessarily mean that the judicial promotion of settlement accords with the requirements of Ch III. Such a conclusion would confuse cause and effect because, as noted earlier, the Constitution controls what judges can do, not vice versa. That being so, what are the notional limits of judicial discretion in these matters, and by whom are these limits determined? This question is addressed in the final section of this Chapter.

A ‘Procedural Continuum’

The preceding analysis demonstrates that what judges and courts ‘do’ cannot be reduced to binary rules, and that what is considered judicial will fluctuate in accordance with the changing social, political and economic demands placed upon the judiciary. It also indicates that the expansion of court-associated ADR and case management (and less adversarial trials) has influenced the nature of the judicial role and the judicial process more generally. While this influence has been especially apparent in the US, it has not been exclusive to that jurisdiction.²²⁹ Australia has also witnessed a blending of dispute resolution models, processes and ideologies, and the maintenance of strict typological boundaries between these models, processes and ideologies has become increasingly untenable.²³⁰ It is widely accepted that judges engage in facilitative processes and techniques, and that (in certain jurisdictions at

²²⁹ *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 168 (Kirby J).

²³⁰ As Hilary Astor and Christine Chinkin explain, constructing ‘the choice as one between ADR or litigation ... carries the erroneous assumption that both ADR and the formal system are homogenous’. Above n 6, 52.

least) they may have done so for some time. A smaller proportion of judges would also appear to engage in evaluative techniques in certain instances. The use of these processes and techniques may be subtle, and may take place in the shadow of an available power, order or function, as well as in the exercise of it.

In procedural terms, therefore, it is simply not possible to delineate absolutely between the processes comprising adjudication and mediation. Martin Shapiro has recognised this reality, and proposed that

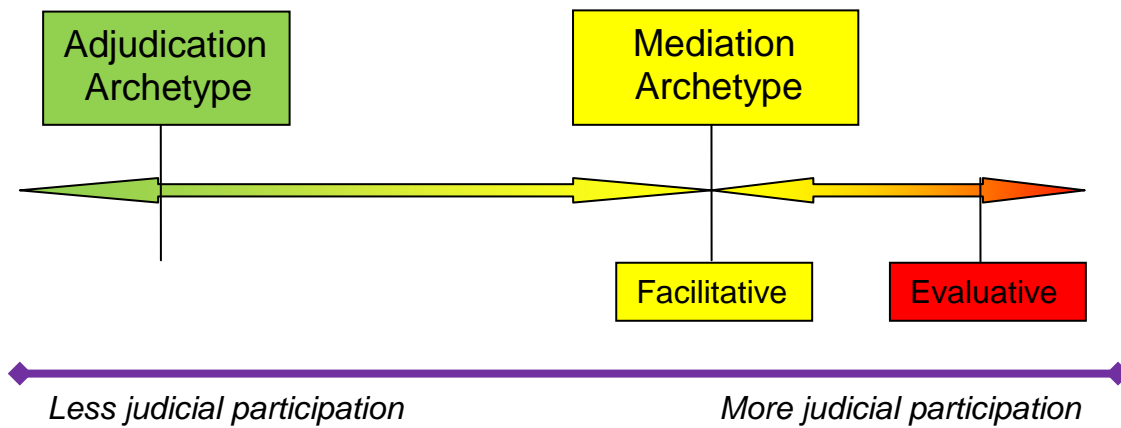
it would be wise to begin over, employing a root concept of “courtiness” but more freely accepting the vast variety of social institutions and behaviours loosely related to that concept without worrying about where “true courtiness” ends and something else begins.²³¹

It is suggested, on this basis, that adjudication and mediation are more aptly described as theoretical archetypes which occupy opposing ends of the same ‘procedural continuum’.²³² The mediation end of the continuum may be further extended so as to range from purely facilitative to evaluative in nature, encompassing both the variety of mediation models that exist in practice and the range of interventions adopted by judges. So expressed, the procedural relationship between adjudication and mediation in the judicial role may be represented diagrammatically as follows:

²³¹ Martin Shapiro, *Courts: A Comparative and political analysis* (1986), 1-2.

²³² This diagram draws upon two sources in particular. The first source is the ‘adjudication matrix’ developed by Marc Galanter, discussed above. See: Marc Galanter, ‘Adjudication, Litigation and Related Phenomena’, above n 50. The second source is the ‘mediation abacus’ developed by John Wade, Sue Gribben and Laurence Boulle at Bond University’s Dispute Resolution Centre, which recognises a number of variable features in mediation. The mediation abacus does not attempt to correlate the features identified with formal adjudication, but it does anticipate the use/adoption by mediators of techniques/processes more commonly associated with formal adjudication. In a sense, therefore, the ‘procedural continuum’ envisaged here is simply an expansion upon this model: John Wade, ‘Mediation – The Terminological Debate’ (1994) 5 *Australian Dispute Resolution Journal* 204.

Figure 2: Procedural Continuum



Whether a particular discretionary function has been exercised in accordance with the rule against bias (ergo the requirements of Ch III) will depend where on the procedural continuum the boundaries of acceptable judicial practice lie in the circumstances.²³³ These boundaries will be estimated in the first instance by individual judges, having regard to any relevant practice directions and his/her own personal views as to the nature of the judicial function. Ultimately, however, the boundaries of acceptable practice will be determined by appellate courts.²³⁴ By sanctioning or condemning specific exercises of case management discretion, appellate courts are able (if they wish) to place markers on the procedural continuum as indicators to judges in subsequent cases (and as a means of managing the flow of subsequent appeals). This conclusion reinforces the importance of appellate jurisdiction to the rule of law.

²³³ *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 169 (Kirby J).

²³⁴ According to Sir Anthony Mason; 'appellate courts should ensure that the correct approach [to case management] is adopted'. 'The Future of Adversarial Justice', above n 43.

Appellate Guidance in the Exercise of Discretion?

What guidance, then, have appellate courts (and the High Court in particular) provided in the exercise of case management discretion? Unsurprisingly, given the presumption that the judiciary should only decide legal issues (and especially constitutional issues) when necessary on the facts,²³⁵ they have provided very little. Nevertheless, it is clear that case management concerns (such as the availability of resources) will be a legitimate consideration. In *Sali v SPC Ltd* ('*Sali v SPC*'),²³⁶ the appellant contended that a Full Court of the Supreme Court of Victoria had erred in failing to grant him an adjournment, and that this refusal had in effect denied him a right of appeal, because (as the listing master was fully aware) his Counsel was unable to commence preparation due to other commitments.²³⁷ A bare majority of the High Court (Toohey and Gaudron JJ dissenting, Mason CJ not sitting)²³⁸ found no such error and dismissed the appeal. Brennan, Deane and McHugh JJ also confirmed that judges are:

entitled to consider claims by litigants in other cases awaiting hearing ... as well as the interests of the parties ... What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.²³⁹

²³⁵ (1908) 6 CLR 469, 590. See also: *Lambert v Weichelt* (1954) 28 ALJR 282, 283 (Dixon CJ), *Cheng v The Queen* (2000) 203 CLR 248, 270 [58] (Gleeson CJ, Gummow and Hayne JJ), *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 473-74 (Gummow and Hayne JJ).

²³⁶ (1993) 116 ALR 625.

²³⁷ *Sali v SPC Ltd* (1993) 116 ALR 625, 627.

²³⁸ *Ibid* 636.

²³⁹ *Ibid*, 629.

On the other hand, in *State of Queensland v JL Holdings Pty Ltd*, ('*JL Holdings*'), the High Court emphasised that the judiciary's 'ultimate aim' is to ensure individual justice, irrespective of case management objectives.²⁴⁰ On the facts, the trial judge had denied the respondents request to amend documents after the commencement of proceedings, but before the hearing date, pursuant to a discretion provided under the *Federal Court Rules 1979*.²⁴¹ Dawson, Gaudron and McHugh JJ held that case management principles (and in particular the efficient operation of the court system) 'should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties'.²⁴² Their Honours warned that:

Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.²⁴³

Thus, while the expediency of trial procedures will ordinarily be a legitimate consideration in the exercise of case management discretion, in the circumstances at hand the refusal to allow the respondents to submit evidence amounted to a breach of procedural fairness. Kirby J agreed with the joint judgment, and added that:

²⁴⁰ *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

²⁴¹ *Federal Court Rules 1979* (Cth), Order 13 Rule 2.

²⁴² *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 155 [5] (Dawson, Gaudron and McHugh JJ). 174, (Kirby J).

²⁴³ *Ibid* 154.

Alterations to the judicial role have been accommodated within the broad discretions conferred by Rules expressed in unqualified terms. Whilst such Rules may not be limited by particular language, they do imply parameters which must be understood by reference to the conventional requirements of justice ... [O]bviously in respect of federal courts, and possibly State courts, constitutional considerations establish the outer limits of permissible managerial practices.²⁴⁴

Sali v SPC and *JL Holdings* establish the ‘outer limits’ of acceptable judicial practice as regards the weight to be attached to case management objectives.²⁴⁵ Neither of these decisions provides any concrete guidance, however, as to where the appropriate balance between quantitative-justice and qualitative-efficiency will lie in specific circumstances.²⁴⁶ Both of these cases also concerned the fair hearing rule, and it is primarily in this context (and more specifically the limits of the discretionary power to refuse amendments after filing or to adjourn proceedings) that the limits of case management discretion have since been considered.²⁴⁷ It is also in this context (and

²⁴⁴ *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 168-69.

²⁴⁵ *In Allesch v Maunz* (2000) 203 CLR 172, [40] (a case involving the exercise of discretion to overturn orders made *in absentia* when acceptable reasons for absence are subsequently presented) Gaudron, McHugh, Gummow and Hayne JJ applied *Sali* and confirmed that ‘the rights of the public in the efficient discharge by courts of their functions must be weighed against unreasonable delay in concluding litigation’.

²⁴⁶ In Sir Anthony Mason’s view, it ‘may be that *J.L. Holdings* has been misinterpreted by some judges as an authority for excessive leniency. If so, appellate courts should ensure that the correct approach is adopted as a counter to the tendency already mentioned’. Sir Anthony Mason, ‘The Future of Adversarial Justice’, above n 43; citing *Ketteman v Hansel Properties Ltd* [1987] AC 189, 220; Lord Harry Woolf, *Access to Justice: Interim Report*, Lord Chancellor’s Department, London (1995), 154.

²⁴⁷ This is unsurprising. As explained in Chapter 1, the primary impetus behind case management has been the need to reduce the costs and length of litigation. Allowing claims to be amended after filing or to grant adjournments will often add considerably to both. Recent examples include: *Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd* [2007] FCA 1623 (Unreported, Finkelstein J, 26 October 2007), [2]; *Cassar v Hans Pet Constructions Pty Ltd* [2008] NSWSC 1386, (Unreported, Rothman J, 23 December 2008), [18] – [24]; *Chameleon Mining NL v Murchison Metals Ltd* [2009] FCA 137 (Unreported, Jacobson J, 5 February 2009), [9] – [15]; *Finerty v Deputy Commissioner of Taxation* [2008] FCA 1136 (Unreported, Spender J, 23 July 2008), [29] – [31]; *Smolle v Australia and New Zealand Banking Group Ltd* [2008] FCA 1065 (Unreported, Jessup J, 18 July 2008), [68]; *Williams v Calivil Park Holsteins Pty Ltd* [2009] NSWSC 31 (Unreported, Schmidt AJ, 12 February 2009), [20] – [21]; *Thoo v Kelly* (2008) 169 FCR 470 [52] (Lindgren J); *Curtin v University of New South Wales*

more specifically the exclusion of rules of evidence) that the limits of the LAT process have been considered.²⁴⁸

What, though, of the rule against bias? What guidance, if any, has the High Court provided as to the boundaries of judicial conduct in this context? As explained previously, it is this rule which presents the primary obstacle to the development of judicial mediation. It is self-evident that case management objectives are also incapable of supplanting the rule against bias, but the outer limits provided by the High Court are extremely broad. The High Court sketched these boundaries in *Re Watson; Ex parte Armstrong* ('*Re Watson*'); finding a reasonable apprehension of bias to have arisen by virtue of statements made by the trial judge during an interlocutory hearing:

During the course of argument a judge will often follow the common, and sometimes necessary, course of formulating propositions for the purpose of enabling their correctness to be tested, and as a general rule anything that a judge says in the course of argument will be merely tentative and exploratory. However, a fair-minded observer would have been justified in thinking that the remarks of the learned trial judge in the present case were not of that description. He expressly said that he thought it might assist counsel in handling the matter to know that he would not accept the evidence of either party – or even an admission – unless it were corroborated. He repeated, and gave reasons for, his rejection of the credit of both parties. He adhered to his statements even after it had been submitted that he should decline to hear the

[2009] NSWSC 269 (Unreported, Hall J, 9 April 2009); *Mijac Investments Pty Ltd v Graham* [2009] FCA 303 (Unreported, Gordon J, 1 April 2009) [22] – [24] (Gordon J).

²⁴⁸ *Truman v Truman* (2008) 216 FLR 365; *Crestin v Crestin* (2008) 39 Fam LR 420.

proceedings further. No doubt he had read and considered the affidavits already filed, but he had not seen either party in the witness box, and the matters which led him to hold that he could not believe them had not been fully examined either in evidence or in argument. It hardly needs to be said that he was not at that stage entitled to form the settled view that neither party was worthy of credit, or to impose on them both the extra-legal requirement that their evidence must be corroborated, but a reasonable observer would have been justified in thinking that he had done so.²⁴⁹

Thus, following *Re Watson*, the outer limits of acceptable conduct vis-à-vis the rule against bias can be said to lie somewhere between the expression of ‘tentative or exploratory’ views, and statements of opinions that indicate a ‘settled view’. These general boundaries have been reaffirmed on a number of occasions,²⁵⁰ as has the fact that a failure to intervene may ‘occasion an injustice’.²⁵¹ In *Vakauta v Kelly*, the appellant contended that the trial judge in a personal injuries claim had made various comments during the hearing indicating a general distrust of medical expert testimony. Finding no bias (actual or ostensible) to have arisen, Brennan, Deane and Gaudron JJ stated that:

It seems to us that a trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the

²⁴⁹ *Re Watson; Ex parte Armstrong* (1976) 136 CLR 248, 264 ((Barwick CJ, Gibbs, Stephen and Mason JJ).

²⁵⁰ *Re Judge Leckie; Ex parte Felman* (1977) 52 ALJR 155, 158; *Re Justice Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 14, 16; *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293-294, 300; *Re JRL, Ex parte CJL* (1986) 161 CLR 342, 349, 351, 359, 368, 371; *Grassby v The Queen* (1989) 168 CLR 1, 20; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 100 (Gaudron and McHugh JJ); *Hinton v Mill* (1991) 57 SASR 97, 99 (King CJ).

²⁵¹ *Galea v Galea* (1990) 19 NSWLR 263, 28-82 (Kirby P).

case remained unknown until they emerged as final conclusions in his or her judgment would not represent a model to be emulated.²⁵²

More recently, in *Johnson v Johnson*,²⁵³ the appellant argued that comments made by the trial judge during discovery raised a reasonable apprehension of bias, as they indicated a prejudgment as regards the credibility of witnesses (in a manner comparable to *Re Watson*).²⁵⁴ Rejecting the appeal, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ (Kirby and Callinan JJ agreeing in separate judgments)²⁵⁵ explained that:

The reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice ... Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.²⁵⁶

It is worth pausing here briefly to point out that all of the preceding cases involved claims of actual or apprehended bias through ‘conduct’ (as opposed to interest, association or extraneous information).²⁵⁷ And, as explained at length in the following

²⁵² (1989) 167 CLR 568, 571.

²⁵³ (2000) 201 CLR 488.

²⁵⁴ Ibid 489; *Re Watson*; *Ex parte Armstrong* (1976) 136 CLR 248.

²⁵⁵ *Johnson v Johnson* (2000) 201 CLR 488, 495-511 [20]-[61] (Kirby J); 511-19 [62]-[86] (Callinan J).

²⁵⁶ Ibid 493 [13].

²⁵⁷ *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).

Chapter, it is primarily in this context that the limits of judicial mediation will fall to be determined. It is also worth pointing out that the conduct complained of in *Re Watson* and *Johnson v Johnson* took place during a prehearing stage, whereas *Vakauta v Kelly* involved comments made during the final hearing. Judicial mediation is a prehearing function, thus *Re Watson* and *Johnson v Johnson* are of more direct relevance in the current context, but all of these cases indicate that the High Court is willing to afford judges a wide discretion to intervene (by expressing tentative opinions) at any stage of the litigation process.

Johnson v Johnson is especially significant for three reasons, however. First of all, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ made it clear in that case that ‘ordinary judicial practice’ is to be interpreted taking ‘account of the exigencies of modern litigation’.²⁵⁸ In so doing the High Court explicitly confirmed what was previously only an implication of *Sali v SPC*; that the requirements of the rule against bias are susceptible to changing case management practices and, in particular, the ‘efficient use of court resources’.²⁵⁹ The range of permissible interventions has increased since *Re Watson* was decided, because the range of circumstances that would indicate to the fictitious bystander that a judge has reached a ‘settled view’ has decreased over time.²⁶⁰ This point is returned to below.

The second reason that *Johnson v Johnson* is significant is that it was decided contemporaneous with the High Court’s decision in *Ebner v Official Trustee*.²⁶¹ As explained in Chapter 4, Gaudron and Kirby JJ’s judgments in that case provided a

²⁵⁸ (2000) 201 CLR 488. See also 505 [46] (Kirby J).

²⁵⁹ *Sali v SPC Ltd* (1993) 116 ALR 625, 629.

²⁶⁰ *Johnson v Johnson* (2000) 201 CLR 488, 505-06 [46] (Kirby J).

²⁶¹ *Ebner v Official Trustee* had already been heard, but judgment reserved: *Johnson v Johnson* (2000) 201 CLR 488, 511, fn 33 (Kirby J).

foothold for the rule against bias as a Ch III implication.²⁶² No constitutional argument was raised in *Johnson and Johnson*,²⁶³ but it seems reasonable to assume that their Honours' (or at least Gaudron and Kirby JJ) were aware of the possibility that, by drawing a connection between the rule against bias and the requirements of modern litigation, they were exposing the procedural protections potentially afforded by Ch III to the demands of case management. In any event, *NAALAS v Bradley* has since confirmed that the rule against bias (taking account of modern litigation practices as per *Johnson v Johnson*) is a Ch III implication.²⁶⁴

This confirmation is of the utmost importance because it reframes the relationship between the rule against bias and the Constitution. Earlier it was pointed out that the Constitution controls what judges can do, not vice versa. The connection drawn in *Johnson v Johnson* (and to a lesser extent *Sali v SPC* and *JL Holdings*) does not fundamentally change this proposition (clearly that would be impossible, or judges could effectively re-write the Constitution), but it does clarify that the nature of judicial power is to be informed, in part, by what judges actually do in practice. This conclusion supports the proposition offered in the introduction to this Chapter; that the implications drawn from Ch III must be interpreted in light of judicial practice, or Ch III jurisprudence runs the risk of being divorced 'completely from the social context within which it exists'.²⁶⁵

²⁶² Ibid 362 [79] (Gaudron J); 382-83 [145]-[146] (Kirby J).

²⁶³ Kirby J stated that: 'I leave aside any requirements that may be inherent in, or implied from, the Constitution. The establishment of an integrated Judicature by Ch III of the Constitution undoubtedly carries with it various affirmative and negative requirements and implications. However, no party to the present appeal (or in the courts below) relied upon a constitutional argument. Without deciding that none is available, I put this potential source for the foundation of the Australian rule on judicial disqualification to one side'. *Johnson v Johnson* (2000) 201 CLR 488, 500 [37].

²⁶⁴ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

²⁶⁵ Shklar, above n 3.

The third reason that *Johnson v Johnson* is significant is that Kirby J took the opportunity in his reasons to summarise existing authorities, and to provide appellate courts with relatively detailed guidance as to how allegations of prejudgment should be determined.²⁶⁶ With the exception of the first point provided, Kirby J's advice does not appear to expand existing authorities (some of which are assayed above). While expressed in the form of 'considerations', His Honour's guidance may be paraphrased in directive form as follows:

1. *Appellate courts should apply a presumption against bias:*

Appellate courts should ordinarily assume that judges 'strive to be independent and impartial'.²⁶⁷

2. *Appellate Courts should accept that interventions are generally desirable:*

'Whatever may have been the tradition in earlier times, opinions favouring silence on the part of an adjudicator during a hearing (which is the surest means of avoiding most allegations of prejudgment) [should now be seen] as carrying risks of an even greater injustice'.²⁶⁸

3. *Appellate Courts should assume that lawyers know the difference between tentative and inflexible opinions:*

'Case management and other changes in the administration of justice have affected the boundaries of acceptable conduct, and 'lawyers know that, in

²⁶⁶ *Johnson v Johnson* (2000) 201 CLR 488, 504-06 [46].

²⁶⁷ *Ibid* 504 [46].

²⁶⁸ *Ibid* 504-05 [46]; citing *Vakauta v Kelly* (1989) 167 CLR 568, 571; *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145. His Honour identified the decision in *Re Watson; Ex parte Armstrong* (1976) 136 CLR 248 as an exemplar of the 'tradition in earlier times'.

most judicial decision-making, the process is a continuous one. Preliminary inclinations do change'.²⁶⁹

4. *Appellate courts should bear in mind that the contemporary adversary system requires judges to provide tentative opinions:*

'The adversary system requires vigorous interaction not only between the parties and their representatives but also between the adjudicator and those persons. Where the parties are represented by trained lawyers, the latter can be taken to be aware of (and presumed, if necessary, to have explained to their clients) the character and purpose of tentative opinions that guide the direction of the trial and encourage its proper focus. No rule of law should be adopted in relation to disqualification for prejudgment which unreasonably undermines, or is fundamentally inconsistent with, that system'.²⁷⁰

5. *Appellate courts should apply less weight to the importance of witness testimony in judicial decision-making than was formerly the case:*

'The 'trend of modern authority' has been to minimise the emphasis placed on judicial 'impressions of witnesses' in favour of 'indisputable facts, contemporary documents and the logic of the circumstances'. Thus, statements as to the credibility of witnesses or the probative value of witness testimony should be considered less likely to indicate bias than may previously have been the case'.²⁷¹

²⁶⁹ *Johnson v Johnson* (2000) 201 CLR 488, 505 [46]; citing Justice Michael Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 18 *Australian Bar Review* 4.

²⁷⁰ *Johnson v Johnson* (2000) 201 CLR 488, 505 [46].

²⁷¹ *Ibid*; citing *State Rail Authority of NSW v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306, 327-30 [87]-[88]; *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* (1999) 161 ALR 599, 605-06

The application of these principles in the lower courts, and their bearing upon the development of mediation, is examined in the following Chapter.

Conclusion

This necessarily lengthy Chapter has attempted to demonstrate that judicial conduct exists on a procedural continuum (or series of continua) between adjudication and mediation archetypes. In Australia, the upper limits of this continuum (that is to say, the extent to which judges may ‘mediate’) appear to have expanded over a relatively short period of time, reflecting a change in judicial attitudes toward the role and obligations of judges in the promotion of settlement. Where on the procedural continuum particular mediation functions will fall cannot be detailed prescriptively, but appellate courts have provided a limited amount of guidance in this respect. This guidance demonstrates that, insofar as the rule against bias is concerned, the boundaries of acceptable judicial participation lie somewhere between the expression of ‘tentative or exploratory’²⁷² views and statements of opinion that indicate a ‘settled view’.²⁷³ The following Chapter returns to the mediation ‘pressure points’ identified in Chapter 1, and examines the guidance provided by appellate courts as to the outer limits of judicial practice in situations comparable to judicial mediation.

[29]-[35]; *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207, 210-211; *Chambers v Jobling* (1986) 7 NSWLR 1, 8-10.

²⁷² *Johnson v Johnson* (2000) 201 CLR 488, 493 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

²⁷³ *Re Watson; Ex parte Armstrong* (1976) 136 CLR 248, 264 (Barwick CJ, Gibbs, Stephen and Mason JJ).

CHAPTER 8

IS JUDICIAL MEDIATION ‘JUDICIAL’?

In this, the final substantive Chapter of this thesis, the constitutional principles isolated in Chapters 2 to 6 are applied to the dispute resolution theory developed in Chapters 1 and 7, in order to determine whether judicial mediation can be carried out in accordance with the requirements of Ch III. This Chapter demonstrates that Australian judges can and do engage in a facilitative model of mediation without offending Ch III, and that the extent to which judges may also engage in evaluative or advisory mediation techniques will depend upon the procedural latitude afforded to them by appellate courts. It also shows that the range of mediation functions that judges can engage in will be greatly increased if informed consent is obtained, and if steps are taken to ensure the confidentiality of proceedings.

At the beginning of Chapter 7 it was explained that two questions must be asked in order to determine whether (or to what extent) judicial mediation accords with the requirements of Ch III. The first question is how, precisely, the power to mediate is, or will be, transmitted to courts. The second question is whether (in light of the answer to the first question) judicial mediation can be exercised in a manner consistent with the rule against bias and the requirements of integrity as they apply in a federal and State/territory context. This second question reflects the conclusions drawn in Chapters 4 and 6; that the judicial process implication and the *Kable* doctrine both operate, in part, to maintain the inherent jurisdiction of the courts.

In anticipation of the first question, a number of Australian processes have already been examined which seek to streamline cases for trial in a procedural sense,¹ and certain less-adversarial trial procedures have been identified which aim to increase judicial control over the civil trial process.² It has also been shown that Australian judges are able to encourage settlement between parties during the prehearing stage, and that this may take place formally (as a settlement conference) or informally (during directions hearings, interlocutory hearings etc).³ In addition, it has been observed that prehearing conferences and settlement conferences (and to a certain extent the Family Court's less adversarial trial process) are typically implemented by the provision of broad discretionary powers, and that the process to be applied during these conferences is ordinarily left to the discretion of individual judges. The first part of this Chapter demonstrates that judicial mediation has also been (and is in the future likely to be) implemented by broad procedural discretions, unfettered by formally prescribed processes.

The second part of this Chapter returns to the mediation 'pressure points' outlined in Chapter 1,⁴ so as to determine whether judicial mediation can be carried out in accordance with the rule against bias. A hypothetical judicial mediation scenario is constructed in order to test the procedural boundaries set in place by appellate courts, and to determine how, or in what circumstances, separate meetings and the requirements of confidentiality might undermine the rule against bias (ergo the judicial process implication and the *Kable* doctrine). By plotting the limits of acceptable practice on the procedural continuum developed in Chapter 7, the current

¹ See above Chapter 7 nn 99-110 and accompanying text.

² Ibid nn 163-93 and accompanying text.

³ Ibid nn 111-33 and accompanying text

⁴ See above Chapter 1 nn 58-70 and accompanying text.

limits of judicial mediation are approximated, and the ramifications of conduct that exceeds these boundaries from a Ch III perspective are identified.

The final part of this Chapter asks whether judicial mediation might undermine the integrity of the judiciary. Building on the analysis undertaken in Chapters 4 and 6, three reasons are offered as to why judicial mediation is highly unlikely to undermine the integrity of Australian courts (federal, State or territory); because judicial mediation satisfies the criterion of integrity (public confidence/impartiality); because the integrity concept is unlikely to be re-applied save in the most extreme circumstances; and because judicial mediation is, in any event, consistent with the underlying object of the separation doctrine and the *Kable* doctrine.

How will judicial mediation be implemented?

It will be noted, with some sense of irony, that the question posed in the title to this section embraces the false dichotomy exposed in the preceding chapter.⁵ To ask how judicial mediation will be implemented is to presuppose that judges do not already mediate, and as the preceding Chapter demonstrates, it is difficult to draw any rigid procedural distinctions between judicial mediation and the processes already undertaken during prehearing. The question is nevertheless a necessary one because, whatever the true relationship between judicial mediation and existing prehearing processes, judges in certain Australian courts have already engaged in (or have already been afforded the opportunity to engage in) discrete processes described

⁵ Hillary Astor and Christine Chinkin, *Dispute Resolution in Australia*, (2nd ed, 2002) 43.

as judicial mediation.⁶ The first matter to be determined, therefore, is how these ostensibly discrete processes have been implemented, and how (if at all) they expand the settlement role already performed by Australian judges.

Options for the implementation of judicial mediation

A variety of options exist for the implementation of judicial mediation. At one extreme, lawmakers (including judicial committees enacting rules of court, or Chief Justices issuing practice directions) may choose to issue judges with a series of narrow and guided discretions that prescribe the mediation process in detail (the ‘hands-on’ approach). At the other extreme, lawmakers may opt to provide judges with a single unqualified discretion to ‘mediate’ (the ‘hands-off’ approach). Sir Anthony Mason has expressed a preference for a hands-on approach; at least to the extent of providing judges with ‘codified’ guidance in the exercise of discretion. This is because, in Sir Anthony’s view, judicial mediation raises the possibility,

not only of coercive influence but of influence which is excessive in the light of the judge’s authority and the deference which will be exhibited to his evaluation. In any event, there is a case for codifying the principles according to which mediations should be conducted. Codification of principles will enable review to take place attended by public scrutiny.⁷

⁶ Mediation processes have also been trialled and/or introduced in various administrative tribunals. See, eg, s 109 of the *Industrial Relations Act 1996* (NSW), which established a judicial conciliation program in the Industrial Court of NSW. See also Monika Schmidt, ‘A Successful Experiment in Judicial Mediation’, (2006) 18(9) *Judicial Officers Bulletin* 7; Tania Sourdin, ‘Judicial Management and Alternative Dispute Resolution Process Trends’ (1996) 14 *Australian Bar Review* 185, 199 (fn 68).

⁷ Sir Anthony Mason, ‘The Future of Adversarial Justice’ (Paper presented at the 17th AIJA Annual Conference, Adelaide, 7 August 1999).

The second half of this Chapter demonstrates that the dangers posed by judges exerting coercive or excessive influence can be sufficiently mitigated in practice. Regardless, though, and as the following section demonstrates, the approach favoured by lawmakers to date has been predominantly hands-off in nature.⁸

Existing judicial mediation processes

The hands-off approach to judicial mediation is consistent with the approach adopted in relation to prehearing processes in general.⁹ As noted in Chapter 7, for example, s 65 of the *Supreme Court Act 1935* (SA) provides that:

(4) The court may itself endeavour to achieve a negotiated settlement of a civil proceeding or resolution of any issues arising in a civil proceeding.

(5) A judge or master who attempts to settle a proceeding or to resolve any issues arising in a proceeding is not disqualified from taking further part in the proceeding but will be so disqualified if he or she is appointed as a mediator in relation to the proceeding.¹⁰

In addition to being the source of power for settlement conferences in the South Australia Supreme Court (the ('SA Supreme Court'), s 65 provides judges with the capacity to engage in 'mediation'.¹¹ In neither case, however, does s 65 provide any

⁸ It is not suggested that the 'judicial mediation' programmes discussed in this Chapter constitute an exhaustive summary of judicial mediation in Australia. As explained at length in Chapter 7, it is difficult to draw clear distinctions between various prehearing processes, thus it may be argued that other processes are in fact a form of judicial mediation. It is also possible that judicial mediation has been implemented informally, or under a different name.

⁹ See above Chapter 7 nn 99-133 and accompanying text.

¹⁰ As amended by the *Statutes Amendment (Mediation, Arbitration and Referral) Act 1996* (SA), s10.

¹¹ Sourdin, 'Judicial Management and Alternative Dispute Resolution Process Trends', above n 6, 199.

guidance as to the process to be followed. The capacity of judges to mediate is reinforced by r 220 ('Mediation') of the *Supreme Court Civil Rules 2006* (SA), sub-s (4) of which provides that a 'Judge or Master may be a mediator', but again, no process is provided, and no practice direction appears to have been implemented in support of this broad discretionary power.¹² It may be that the opportunity to mediate has not yet been taken up by any judges in South Australia, or it may be that the exercise of this discretion has simply taken place 'off the record'.¹³ In either event, it would not appear that any formal process for judicial mediation has been prescribed (so far at least) in South Australia. Nor have any specific principles been codified 'according to which mediations should be conducted'; beyond the general case management objectives contained in r 3.

In 2002, a judicial mediation programme was trialled in the New South Wales District Court (the 'NSW District Court').¹⁴ The pilot project is now complete, although judges still mediate in 'special cases'.¹⁵ Judicial mediations are held pursuant to the general overriding objective contained in the s 56 of *Civil Procedure Act 2005* (NSW) for the 'just, quick and cheap resolution of the real issues in the proceedings', the power to give directions under s 61 'for the speedy determination of the real issues between the parties to the proceedings', and the power under s 26 to refer matters for mediation.¹⁶ No formal procedures for the conduct of judicial mediations were

¹² This conclusion is based, in part, on a telephone conversation held with the Supreme Court Registry on 12th August, 2009.

¹³ James A. Wall, Lawrence F Schiller, and Ronald J. Ebert, 'Judicial Settlement Techniques' (1981) 5 *American Journal of Trial Advocacy* 39, 89.

¹⁴ The NSW District Court has the capacity to exercise Ch III judicial power and is therefore subject to the implications of the *Kable* doctrine. See above Chapter 6 nn 117-27.

¹⁵ Letter from Judge Margaret Sidis to Iain Field, 20th August 2009. See Appendix.

¹⁶ *Ibid.*

provided. However, according to Judge Margaret Sidis – who chaired the pilot project – judicial mediations are conducted according to 5 specific rules:

1. All persons present, including the judge, lawyers, experts and parties must sign a Mediation Agreement that binds them to maintaining the confidentiality of everything said and done during the mediation.
2. The judge does not give legal advice.
3. The judge does not make any decisions or rulings. The judge's function is to assist the parties to come to their own resolution of their dispute.
4. All notes taken by the judge are shredded at the conclusion of the mediation. Only the signed agreement will remain on the court file as evidence of the commitment to confidentiality.
5. The judge will not hear the case if the mediation is not successful. The file will be marked "Not to be Listed before Judge X"

In addition the parties are required to have present at the mediation the persons who are responsible for the ultimate decision concerning the resolution of the dispute.¹⁷

In the NSW District Court, therefore, certain of 'the principles in accordance with which mediations should be conducted' are made explicit to judges. However, and crucially, none of these principles are codified in the form of court rules or practice directions. The principles encapsulated in these rules are examined below, but it is

¹⁷ Letter from Judge Margaret Sidis to Iain Field, 20th August 2009. See Appendix. See also, Judge Margaret Sidis, 'Judicial Mediation in the District Court' (2006) 18(9) *Judicial Officers Bulletin* 74.

worth reinforcing the fact that the process is entirely confidential, that judge-mediators are instructed to avoid evaluating legal rights or positions (although not necessarily other interests), that judges cannot subsequently adjudicate a matter that they have mediated, and that all records of the mediation are destroyed.

More recently, judicial mediation has been introduced in the Supreme Court of Western Australia (the 'WA Supreme Court'). The 'Supreme Court Mediation Programme' (the 'SCMP (WA)') is implemented by practice direction,¹⁸ and states that the 'Court may direct that a mediation be conducted by a Judge of the Court if warranted by the particular aspects of the case'.¹⁹ The source of authority for judicial mediation is Part VI of the *Supreme Court Act 1935* (WA),²⁰ which authorises the provision of 'judicial mediation conferences'. Section 69 of the *Act* permits mediation to be 'carried out by a mediator under a direction of the Court and subject to the rules of court'. Section 69 does not explicitly authorise mediation by judges, but it does not prohibit it; defining a mediator as 'a person approved by the Chief Justice to be a mediator under the rules of court'.

Neither the *Act* nor the SCMP (WA) prescribes a process to be followed during mediation. A number of general directions are made in the SCMP (WA) detailing matters such as privilege and confidentiality,²¹ the likely duration of the process,²² and the obligations of counsel prior to mediation (including reality testing and doubt

¹⁸ Supreme Court of Western Australia, *Supreme Court Mediation Programme* (Practice Direction No 2 of 2008), now contained in the Supreme Court of Western Australia *Consolidated Practice Directions* (22nd January 2009), PD 4.2.1.

¹⁹ Ibid PD 4.2.1 (3).

²⁰ Ibid PD 4.3.1 (5).

²¹ Ibid PD 4.2.1 (5).

²² Ibid PD 4.2.1 (18).

creation – in order, presumably, to ‘soften clients up’ for compromise).²³ However, none of these directions provide any indication as to how, exactly, judges are to mediate. Thus, the SCMP (WA) makes no attempt to codify ‘the principles according to which mediations should be conducted’.²⁴

The possibility also exists for judges in the District Court of Western Australia (the ‘WA District Court’) to engage in judicial mediation. Rule 24 (2) (e) of the *District Court Rules 2005* (WA) provides the Court with the power, inter alia, to ‘direct some or all of the parties to confer on a “without prejudice” basis in order to settle the case or, failing settlement, to resolve as many of the issues between them as possible’. In its response to NADRAC’s Issues Paper ‘Alternative Dispute Resolution in the Civil Justice System,’²⁵ the WA District Court stated that:

In practice the mediation is listed before a registrar of the Court. The power is wide enough to allow the mediation to be listed before a Judge of the Court, though this has not as of yet been done ... The general framework for a mediation conference is the same as a pre-trial conference.²⁶

The framework referred to is contained in rr 35-35A of the *District Court Rules 2005* (WA) which, as explained in Chapter 7, does not provide any guidance as to how judges should, in fact, mediate. As in South Australia, it may be that judges in the

²³ Supreme Court of Western Australia *Consolidated Practice Directions* (22nd January 2009), PD 4.2.1 (26). These techniques were explained in Chapter 1 above nn 49-51.

²⁴ Mason, ‘The Future of Adversarial Justice’, above n 7. The extent to which techniques such as reality testing and doubt creation may undermine the rule against bias (and Ch III), and the extent to which judges actually engage in these techniques in the Supreme Court of Western Australia, is considered in more detail in the second half of this Chapter.

²⁵ National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution in the Civil Justice System*, NADRAC IP (2009).

²⁶ District Court of Western Australia, ‘Background Paper: The WA District Court’s ADR Program’ (Submission in response to the NADRAC Issues Paper on Alternative Dispute Resolution in the Civil Justice System, 15th May 2009), 5.

WA District Court have in fact mediated informally during prehearing, and that in both jurisdictions judges are reluctant to acknowledge the full extent of their participation during prehearing due to uncertainty as to the limits of acceptable practice. Tania Sourdin suggests that this uncertainty may be more pronounced at the State than the federal level:²⁷

For example, Chief Justice Spigelman of the Supreme Court of New South Wales anticipates that there will be no situations where judges of the New South Wales Supreme Court will be involved in mediations. This approach would appear to be consistent with some other jurisdictions within Australia. However, in contrast, in the federal jurisdictions, judges and tribunal members are more likely to act as mediators and there has been no policy direction to suggest that they should not. Indeed, the Chief Justices' Council Declaration has stated that there are circumstances where it is appropriate for a judge to mediate.²⁸

This suggestion appears to draw on personal observation and experience, as opposed to empirical data. In any event, given that judges in NSW District Court and the WA Supreme Court now openly engage in judicial mediation, it may no longer be accurate to say that federal judges and tribunal members are 'more likely' to act as mediators than State judges (although they may be more willing to acknowledge that they do so). Nevertheless, it is true that Federal Court Judges have had the formal capacity to

²⁷ It is worth pointing out that this proposition is not contradicted by the conclusion, drawn earlier in this thesis, that the implications of Ch III are generally greater at the federal level because, whether elevated to the level of constitutional imperative or not, the rule against bias is an integral part of the judicial process in all Australian jurisdictions.

²⁸ Tania Sourdin, 'Facilitative Judging' (2004) *Law In Context* 64, 70; citing Chief Justice James Spigelman, 'Mediation and the Court' (2001) 39(2) *Law Society Journal* 62; and Australia and New Zealand Council of Chief Justices, *Position Paper and Declaration of Principle on Court-connected Mediation* (Council of Chief Justices, 1999).

engage in mediations for some time and that a limited number of judicial mediations have been held in that Court.²⁹ Order 72 r 7 of the *Federal Court Rules 1979* sets out the following guidelines for mediation conferences conducted by court officers:

- (1) A mediation conference must be conducted:
 - (a) in accordance with any directions given by the Court or a Judge;
 - and
 - (b) as a structured process in which the mediator assists the parties
 - by encouraging and facilitating discussion between the parties
 - so that:
 - (i). they may communicate effectively with each other
 - about the dispute; and
 - (ii). if agreement is reached and if the parties consent, the
 - agreement can be included in a consent order under
 - Order 35, rule 10.

It will be noted that, although r 7 alludes to a ‘structured process’, it does not in fact prescribe one. Even if it did, r 7 does not apply to mediations conducted by a judge.³⁰ Rather, according to Order 72 r 3, if ‘a Judge undertakes a mediation, the Judge may give any directions with respect to the conduct of the mediation that the Judge thinks fit’. Thus, in the Federal Court as the SA Supreme Court, the NSW District Court and the WA Supreme Court, judicial mediations are not intended to follow a prescribed process, and no principles are formally codified according to which mediations should be conducted.

²⁹ Chief Justice Michael Black, ‘The Courts Tribunals and ADR’ (1996) 7 *Australian Dispute Resolution Journal* 138, 138.

³⁰ *Federal Court Rules 1979*, O 72 r2(1).

In summary, the trend amongst lawmakers at both the State and federal level has been to adopt a hands-off approach to the development of judicial mediation. Unless concerns such as those highlighted by Sir Anthony (noted above) manifest in sufficiently numerous or serious abuses of discretion, it seems likely that this trend will continue. David Spencer has reached a similar conclusion, considering it ‘unlikely that the appointment of judicial mediators [will] include anything beyond the criterion of the role and the mandate to mediate cases coming before the courts’.³¹

Even if no formally structured process is provided, however, is it possible that, simply by describing a prehearing process as ‘judicial mediation’, lawmakers have given license to a broader range of prehearing techniques and processes than would otherwise have been available to judges? Put differently, is there an inherent difference between judicial mediation and, say, settlement conferences?

Formal distinctions between prehearing processes?

Sir Laurence Street has argued that, in certain courts, ‘a re-vamp of the well-understood and useful settlement or prehearing conference has been mis-described as mediation’.³² It would appear that, in Sir Laurence’s view, the fundamental difference between these processes is that mediation involves private meetings between the mediator and one of the parties.³³ It has already been intimated that this may be an

³¹ David Spencer, ‘Judicial Mediators: Is the time right? – Part 1’ (2006) 17 *Australian Dispute Resolution Journal* 130, 138.

³² Sir Laurence Street, ‘Mediation and the Judicial Institution’ (1997) 71 *Australian Law Journal* 794, 795. See also Sir Laurence Street, ‘The Courts and Mediation – A Warning’ (1991) 2 *Australian Dispute Resolution Journal* 203.

³³ Street, ‘Mediation and the Judicial Institution’, above n 32, 795.

oversimplification,³⁴ and this proposition is further demonstrated later in this Chapter. While Sir Laurence's conclusion may assume a particular (and inflexible) definition of mediation, however, it does highlight the fact that theoretical distinctions between dispute resolution models can be blurred in practice;³⁵ a possibility which should be borne in mind when examining processes described as 'judicial mediation'. This raises the question: how do the statutes, court rules and/or practice directions outlined above define judicial mediation, and how do they distinguish between judicial mediation and other prehearing processes? The short answer is that they do not, although subtle distinctions can be drawn in certain instances by analogy and deduction. In demonstrating this point, it is useful to recall the three overarching categories of dispute resolution identified by NADRAC; facilitative, advisory/evaluative and determinative.³⁶

For example, r 4 of the *Federal Court Rules 1979* merely states that “*mediation*” means mediation conducted under a mediation order’. Order 72 r 7 of the *Federal Court Rules* provides a more detailed definition of mediation, which (as noted above) draws attention to the mediator's role in ‘encouraging and facilitating discussion’.³⁷ This definition suggests a classical model of mediation. However, r 4 only applies to mediations conducted by registrars.³⁸ Even if this definition were to apply to

³⁴ See above Chapter 1 nn 54-57 and accompanying text.

³⁵ Australian National Mediator Standards, *Approval Standards* (2008), 5.

³⁶ National Alternative Dispute Resolution Advisory Council (NADRAC) *Dispute Resolution Terms* (AGPS, Canberra, September 2003), 4. See above Chapter 1 n 7 and accompanying text.

³⁷ The definition provided in r 7 is similar to the various broad definitions of mediation considered in Chapter 1. For example, Tania Sourdin states that, ‘at its simplest, mediation involves the intervention of a trained, impartial third party ... who will assist the parties to reach their own solutions’. Tania Sourdin, *Alternative Dispute Resolution*, (2005) 26. Laurence Boulle has previously defined mediation as ‘a decision-making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them can assent, without having a binding decision-making function’. Laurence Boulle, *Mediation: Principles Process Practice* (2005), 3.

³⁸ *Federal Court Rules 1979* (no. 140 as amended), O 72 r 2.

mediations conducted by judges, the *Federal Court Rules* provide no definition of ‘case management conferences’; so there is nothing to say that judges cannot also encourage and facilitate discussions (or indeed evaluate the parties positions) during these conferences. Indeed, and as explained in Chapter 7, there is evidence to suggest that, in practice, federal court judges will utilise case management conferences (and other case management machinery) to facilitate negotiation between the parties.³⁹

The distinction between judicial mediation and other prehearing processes is also uncertain in the Supreme Court of South Australia. Section 65 of the *Supreme Court Act 1935* (SA) prevents judges who have mediated from subsequently adjudicating, but no such prohibition exists if a judge has merely attempted to ‘settle a proceeding or to resolve any issues’. Thus, s 65 draws an implicit distinction between the terms ‘negotiated settlement’ and ‘resolution, on the one hand, and ‘mediation’, on the other. However, nowhere in the *Act* are these processes defined. Rule 4 of the *Supreme Court Rules 2006* (SA) provides some guidance; defining mediation as ‘a process by which a person (the *mediator*) assists the parties to a dispute to reach an agreement to settle the dispute’. Rule 4 goes on state that:

Mediation may, for example, involve -

- (a) conciliation;
- (b) suggestion of a possible basis for agreement or further negotiation.

³⁹ Justice Robert French, ‘Managerial Judging in the Federal Court’ (2005) 32(8) *BRIEF* 5, 9; Annesley DeGaris, ‘The Role of Federal Court Judges in the Settlement of Disputes’ (1994) 13 *University of Tasmania Law Review* 217, 225-26. See also: Law Reform Commission of New South Wales, *Studies in Comparative Civil and Criminal Procedure: Volume 2 - Innovations in Civil and Criminal Procedure*, Consultant’s Paper by John Bishop (1978), 19.

However, the *Rules* do not define what ‘conciliation’ is. It may be, as the Australian National Mediator Standards suggest, that the term ‘conciliation’ incorporates ‘an “advisory” component, or ... the provision of expert information and advice’.⁴⁰ This definition is supported by example (b), and would also explain why judges are excluded from adjudicating (because the provision of advice could indicate that a judge has formed a ‘settled view’, thus undermining the rule against bias).⁴¹ Were the *Supreme Court Rules* to state that settlement conferences are purely facilitative in nature this distinction could be highly significant. However, there is nothing in the *Supreme Court Rules* to suggest that judges conducting settlement conferences should not also suggest ‘a possible basis for agreement’; and as NADRAC has observed, ‘terms such as “conferencing” and “conciliation” are used in almost as many ways as “mediation.”’⁴²

As judicial mediations in the NSW District Court are conducted according to the general objectives of the *Civil Procedure Act 2005* (NSW), no formal distinctions can be drawn between judicial mediation and the other prehearing processes established in that *Act*. However, the only prehearing processes to be formally prescribed in NSW are directions hearings which, as explained in the previous Chapter, are ideologically procedural in nature.⁴³ Thus, it may be possible to distinguish between judicial mediations and other prehearing processes in the NSW District Court, on the basis that the former involves the facilitation of substantive issues during prehearing,

⁴⁰ Australian National Mediator Standards, above n 35, 5.

⁴¹ *In Re Watson; Ex parte Armstrong* (1976) 136 CLR 248, 264 (Barwick CJ, Gibbs, Stephen and Mason JJ), the High Court stated that the rule against bias will be undermined if a judge’s statements were to indicate a ‘settled view’. This point is considered further in the second half of this Chapter. See also *Johnson v Johnson* (2000) 201 CLR 488, 493 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁴² NADRAC, *Alternative Dispute Resolution in the Civil Justice System*, above n 25, 6 [2.21].

⁴³ *Civil Procedure Act 2005* (NSW), ss 61-62.

whereas the latter merely streamlines issues for trial. Whether any such distinction is or was reflected in practice is uncertain, a point returned to below.

A more conceptually satisfying approach to the distinction between judicial mediation and other prehearing processes can be discerned from SCMP (WA). Although the SCMP (WA) provides no definition of mediation as such, it implicitly distinguishes mediation from other prehearing processes by channelling the bulk of disputes through mediation. PD 4.2.1 (1) states that mediation ‘is an integral part of the management process, and, in general, no case is to be listed for trial [*viz.* a final hearing] without the mediation process having first been exhausted,⁴⁴ and PD 4.2.1 (7) encourages judges to engage in mediation as early as possible in the litigation process.⁴⁵ PD 4.2.1 (13) goes on to state that, ordinarily, directions for trial are only to be made if the mediation process has been unsuccessful and,⁴⁶ in such circumstances,

⁴⁴ This point is reinforced throughout the Supreme Court of Western Australia, *Supreme Court Mediation Programme* (Practice Direction No 2 of 2008), now contained in the Supreme Court of Western Australia *Consolidated Practice Directions* (22 January 2009). For example, 4.2.1 (14) states that mediation ‘by a Mediation Registrar is a holistic part of the management process, and, in general, no case is to be listed for trial without the mediation process having first been exhausted’. PD 4.2.1 (8), states that ‘practitioners must be able to justify a refusal to go to mediation, particularly where the matter is yet to be mediated or, in a case that has previously been mediated, the other side is willing to return to mediation. Practitioners should bear in mind that, in general, no case will be listed for trial without the mediation process having first been exhausted’.

⁴⁵ Research as to when in the litigation process mediation is most effective has proved inconclusive. Kathy Mack, *Court Referral to ADR: Criteria and Research* (2003) 40. However, there is evidence from South Australia to suggest that ‘earlier referral to mediation, particularly in cases where the dispute is of a short duration may assist to reduce both public and private cost expenditure’. Tania Sourdin, *Mediation in the Supreme and County Courts of Victoria* (2009) 146 [5.55]. The Supreme Court of Western Australia *Consolidated Practice Directions* (22nd January 2009), r 4.2.1 (7) states that the ‘timing of mediation is important and will vary from case to case. Many cases benefit from early mediation prior to substantial costs being incurred and the parties becoming entrenched in their positions. The Court will make mediation orders prior to the filing of pleadings or affidavits in appropriate cases’.

⁴⁶ The Supreme Court of Western Australia *Consolidated Practice Directions* (22nd January 2009), 4.2.1 (13) states that where ‘a party is represented by a solicitor or counsel, it is not necessary for a party also to attend a directions hearing or other interlocutory hearing, unless required to do so by subpoena or other order of the Court’.

PD 4.2.1 (15) has the effect of transforming the mediation conference into a directions hearing.⁴⁷

The same approach may be adopted in the WA District Court. The *District Court Rules 2005* (WA) provide no definition of mediation, and do not place mediation conferences at the forefront of the prehearing process in a manner comparable to the SCMP (WA). However, r 35A states that ‘mediation may serve as a pre-trial conference’. Rule 35A goes on to state, inter alia, that:

- (1) If, pursuant to a case management direction, the parties to a case have conferred with a mediator, the Court may order that there is not to be a pre-trial conference in the case.
- (2) An order under subrule (1) may be made –
 - (a) at the conference with mediator, if the mediator is a legally qualified registrar;
 - (b) after the conference with the mediator;
 - (c) before or after the case is entered for trial;
 - (d) even if notice of a pre-trial conference has been given under rule 39;
 - (e) on the application of a party or, after notifying the parties, on the Court’s own initiative.

⁴⁷ The Supreme Court of Western Australia *Consolidated Practice Directions* (22nd January 2009), 4.2.1 (15) states that where ‘it appears [to the mediator] that a matter is likely to proceed to trial, directions are to be made for the early preparation of the trial bundle’.

- (3) If the Court makes an order under subrule (1) ... [the rules relating to pre-trial conferences] ... apply as if the conference with the mediator had occurred at, or as ordered in, a pre-trial conference.

As noted above, it does not appear as though judges in the WA District Court have yet engaged in a process formally described as judicial mediation, and r 35A does not predict their doing so. Were District Court judges to engage in mediation, however, it seems reasonable to conclude that they would have the power to issue orders ‘at the conference’ in a manner comparable to registrars (subject to requirements of the rule against bias, examined below).

By formulating mediation and directions hearings as different stages of a continuous process, the approach taken in Western Australia reflects the proposition, supported in Chapter 7, that litigation ‘and negotiation are [no longer] viewed as distinct but as continuous’.⁴⁸ Indeed, it is possible that this approach is in reality ‘but an exemplar’⁴⁹ of the prehearing process in other Australian jurisdictions. Justice Louise Otis, the architect of the Quebec Court of Appeal’s judicial mediation programme, made substantially the same point in an address to the Victorian Bar. Asked whether she saw any inconsistency between mediation and the ‘public’ role of judges, Her Honour replied that:

We have presided over pre-trial settlement conferences for decades. What is a ‘prehearing conference’? [What does it mean] to manage the case? You know

⁴⁸ Justice Andrew Rogers, ‘Judges in Search of Justice’ (1987) 10 *University of NSW Law Journal* 93, 104; citing Judge Charles Renfrew, ‘Negotiation and Judicial Scrutiny of Settlements in Civil and Criminal Anti Trust Cases’ (1975) 57 *Chicago Bar Record* 130, 131.

⁴⁹ Hugh Landerkin and Andrew Pirie, ‘Judges as Mediators: What’s the Problem with Judicial Dispute Resolution in Canada?’ (2003) 82(2) *Canadian Bar Review* 249, 266.

that when you are in the chamber with the parties you try to settle the case.

This [has existed] for decades and you do not complain. Mediation is just an extension of [this].⁵⁰

Certainly, the discretionary powers afforded by the *Federal Court Rules 1979*, the *Civil Procedure Act 2005* (NSW) and the *Supreme Court Rules 2006* (SA) are broad enough to permit judicial mediation. That being so, is it actually necessary or beneficial to explicate the relationship between mediation and other prehearing processes? Is the Western Australian model a model to be emulated? Arguably it is. Although the Western Australian approach does not rigidly clarify the boundaries of acceptable judicial conduct during prehearing, it does make it plain to judges, counsel and litigants that mediation is a vital feature of the judicial process, and that judges will generally be supported by appellate courts in the application of this function. In so doing, this approach removes some of the uncertainty regarding the role of judges during prehearing which, as noted above, may hinder the development of novel judicial practices (such as judicial mediation), and/or discourage candid appraisals of judicial practice.

To return to the question posed at the beginning of this section, none of the judicial mediation programmes examined above formally prescribe the mediation process to be adopted by judges, and it seems likely that in practice the majority of guidance will be provided in the form of mediator training (as in the NSW District Court).⁵¹ It also remains uncertain how (if at all) these arrangements expand the settlement role already performed by Australian judges. It follows that the only way to determine

⁵⁰ Justice Louise Otis, 'Judicial Mediation: Prospects and Issues' (Speech delivered at the Seminar of the Victorian Bar, Melbourne, 14 May 2009).

⁵¹ The same is true of judicial mediation in Quebec. Ibid.

whether judicial mediation can be conducted in accordance with the requirements of Ch III is to determine what judicial mediators actually do (or may do) in practice.

What do Judicial Mediators do?

Unsurprisingly, since prehearing processes are generally held ‘off the record’, there is a dearth of information available as to how, precisely, Australian judges mediate in practice.⁵² As noted above, the five specific rules of mediation adopted in the NSW District Court state that judge-mediators are not to provide legal advice. This does not necessarily mean that judge-mediators should not advise on other matters or evaluate other interests (such as, for example, the possible psychological or financial impact of litigation). However, Judge Margaret Sidis states that her practice in the NSW District Court has been ‘to advise parties and their representatives at the very start of the mediation that, as a mediator, I do not judge, express any opinions, give any judgment or provide any advice’.⁵³ If the same approach is adopted in practice by other judges in the NSW District Court, then (barring separate meetings, which may or may not be held in practice) judicial mediation in the NSW District Court broadly conforms to the classical mediation model, in line with the definition provided by NADRAC (or towards the green zone of the procedural continuum developed in Chapter 7).⁵⁴

Anecdotally, there would appear to be a wider variance in mediator styles in the WA Supreme Court, although case law in that jurisdiction also indicates that judges should

⁵² As James Wall, Lawrence F Schiller and Ronald J. Ebert have pointed out (albeit from a US perspective), almost ‘all judicial techniques used during the settlement process are off the record either because there are no stenographers or recording devices at the pretrial or settlement conferences, or because judges seldom allow their overtures to become part of the court record’. Above n 13.

⁵³ Sidis, ‘Judicial Mediation in the District Court’, above n 17, 74-75.

⁵⁴ See above Chapter 7 nn 231-32, and figure 2.

take care when expressing opinions.⁵⁵ Judge-mediators in the SA Supreme Court have engaged in separate meetings, although it is unclear which techniques are employed during mediation, or whether judges will ever provide advice (be it legal or otherwise).⁵⁶

Overseas programs may provide certain insights into judicial mediation practice, but accounts of what judges do or do not do in foreign jurisdictions must be treated with caution given Australia's unique constitutional structure.⁵⁷ Theoretically comparisons may be useful in purely factual scenarios, but in practice it may be difficult to separate these disputes from disputes that have been filtered through local constitutional concerns. In any event, no single model of judicial mediation emerges from overseas examples. As explained at length in the preceding Chapter, the participation of US judges in the settlement process displays 'substantial variations in the level of intensity',⁵⁸ which range from purely facilitative to evaluative in nature.⁵⁹ In Quebec, judicial mediation is ostensibly limited to a purely facilitative model, and mediating judges are trained to avoid any evaluative input. This restriction is considered essential to avoid any contradiction between the evaluations made by mediating

⁵⁵ *Ruffles v Chilman* (Unreported, Supreme Court of Western Australia, Kennedy, Franklin and White JJ, 19 May 1996).

⁵⁶ *Duke Group Ltd (in liq) v Alamain Investments Ltd* [2003] SASC 272 (Unreported, DeBelle J, 8 August 2003).

⁵⁷ Kirby J has warned that it would be a 'fundamental mistake to attach large significance to [constitutional arrangements] in non-federal countries, including the United Kingdom, New Zealand and South Africa. The legal texts are distinguishable. The constitutional obligations are different. The traditions that have grown around those obligations are peculiar. One illustration will suffice. The combination in the United Kingdom, until recently, in one person, the Lord Chancellor, of legislative, executive and judicial functions, is inconceivable in an Australian constitutional context'. *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 120 [189].

⁵⁸ Herbert Kritzer, 'The judges' role in pre-trial case process' (1982) 66 *Judicature* 28, 30.

⁵⁹ See, especially; John Paul Ryan, Allan Ashman, Bruce D Sales and Sandra Shane-Dubow, *The American Trial Judge* (1980), Wall, Schiller and Ebert, above n 13; Marc Galanter, 'Adjudication, Litigation and Related Phenomena', in Leon Lipson and Stanton Wheeler (eds), *Law and Social Sciences* (1986), 151.

judges and the final determination of adjudicating judges.⁶⁰ In contrast, according to Margaret Shone, it is common for Albertan judges engaged in judicial mediation to ‘begin using one ADR [model], then flip to another and another, sometimes in a seemingly random way’.⁶¹

While it is impossible to state precisely or uniformly how judges will or do mediate, in Australia or overseas, it is possible to identify those features of mediation which have the greatest potential to conflict with the requirements of Ch III. In Chapter 1, three pressure points in the relationship between mediation and the judicial function were identified; the participation of the judge-mediator, the privacy of the mediation process, and the confidentiality of proceedings. These pressure points served as waypoints by which the relevant legal ‘rules’ were identified, and Chapters 2 through 6 charted the correlation between these rules and the implications drawn by the High Court from Ch III. It was concluded that the fair hearing rule and the principles of open justice are generally restricted to the exercise of the judiciary’s core decision-making power,⁶² and are therefore unlikely to impede the development of judicial mediation (because judicial mediation is by definition non-determinative). In contrast, it was shown that Ch III implications rooted in notions of judicial independence and impartiality may have an impact on prehearing events such as judicial mediation.⁶³

The impartiality principle is manifest in the judicial process implication and the *Kable*

⁶⁰ Otis, ‘Judicial Mediation: Prospects and Issues’, above n 50.

⁶¹ Margaret Shone, ‘Law Reform and ADR: Pulling Strands in the Civil Justice Web’ (Paper presented at the Australasian Law Reform Agencies Conference, Wellington, April 13-16 2004), [34].

⁶² *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); Joseph Jaconelli, *Open Justice: A critique of the open trial* (2002), 65. The principles of open justice may also be of relevance to institutional integrity, however. See generally, Chief Justice James Spigelman, ‘Seen to be Done: the Principle of Open Justice – Part II’ (2000) 74 *Australian Law Journal* 378.

⁶³ *Webb v The Queen* (1994) 181 CLR 41, 68 (Deane J); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ). 361 [81] (Gaudron J); 382-83 [145]-[146] (Kirby J).

doctrine, both of which, amongst other things, entrench the rule against bias⁶⁴ and notions of integrity.⁶⁵ The remainder of this Chapter demonstrates that judicial mediation is unlikely to undermine either of these requirements, and argues that obtaining informed consent, ensuring a strict policy of confidentiality, and requiring the recusal of judge mediators from adjudication in certain circumstances, should be sufficient to mitigate most, if not all, of the potential conflicts between judicial mediation and Ch III.

Does Judicial Mediation offend the Rule against Bias?

Chapters 4 and 6 demonstrated that the rule against bias is an implicit requirement in all Australian courts; federal, State and territory.⁶⁶ Chapter 7 showed that judicial practice can be plotted on a ‘procedural continuum’, and that whether a particular discretionary function has been exercised in accordance with the rule against bias (and the due process requirements implied by Ch III), will depend where on that procedural continuum the boundaries of acceptable judicial practice lie. The following section returns to the mediation pressure points identified in Chapter 1, and plots the boundaries of acceptable practice applicable to judicial mediation. It is argued that

⁶⁴ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 361 [81] (Gaudron J), 382-83 [145]-[146] (Kirby J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 79 [73] (Gummow Hayne and Crennan JJ), 122 [195] (Kirby J).

⁶⁵ *Nicholas v The Queen* (1998) 193 CLR 173, 208 [73] (Gaudron J), 222 [115] (McHugh J), 258 [201] (Kirby J), 272-73 [234] Hayne J.

⁶⁶ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 362 [79] (Gaudron J); 382-83 [145]-[146] (Kirby J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); Fiona Wheeler, ‘Due Process, Judicial Power and Chapter III in the High Court’ (2004) 32 *Federal Law Review* 205, 216. See also, Enid Campbell, ‘Waiver of judicial disqualification for bias or apprehended bias – a constitutional issue’ (1999) 2 (3) *Constitutional Law & Policy Review* 41, 41; Leslie Zines, *The High Court and the Constitution* (5th ed, 2008), 278.

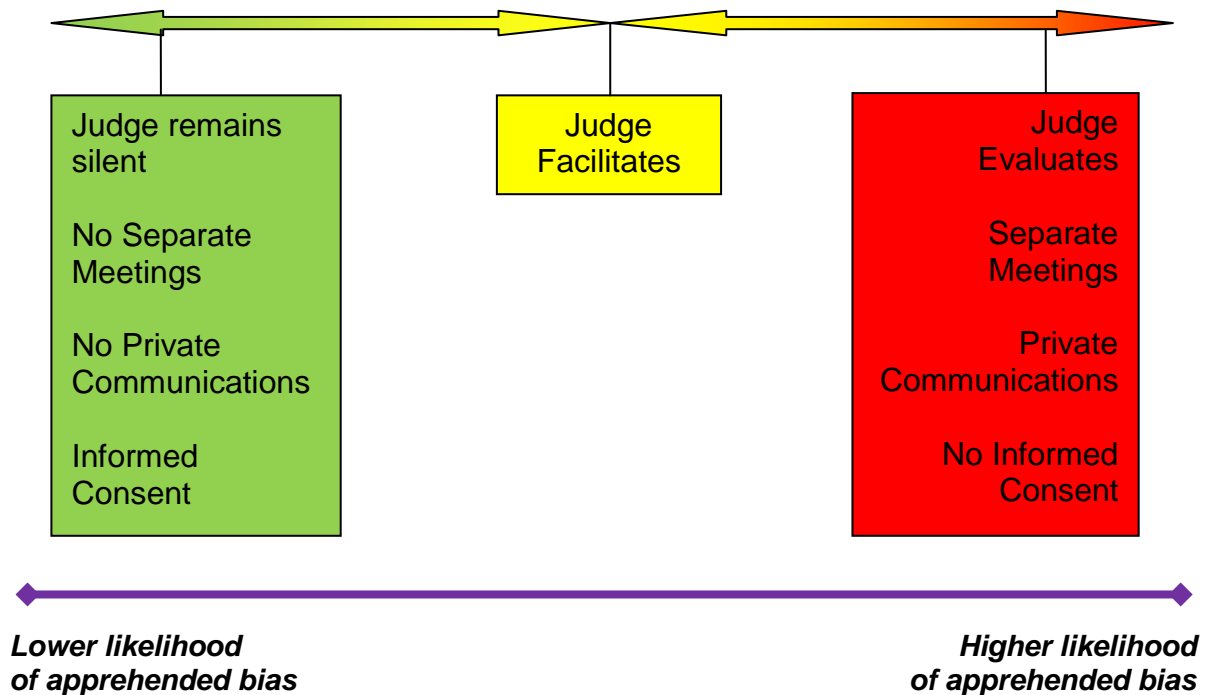
whether bias is reasonably apprehended will depend on myriad factors specific to the case at hand.

From the outset, it is crucial to appreciate that, when determining whether a power is judicial, ‘one looks at the decision, rather than the process to get there’.⁶⁷ Thus, as Gleeson CJ, McHugh, Gummow and Hayne JJ stated in *Ebner v Official Trustee in Bankruptcy*, the question in cases of apprehended bias is whether, ‘a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide’.⁶⁸ Since judicial mediation does not involve a judicial decision, the rule against bias will only be engaged if mediation is unsuccessful; whereupon things said or done by the judge-mediator may require his or her disqualification. This possibility is examined in more detail later. For present purposes it is assumed that mediation has failed and that the judge-mediator is or will be conducting the final hearing. On this basis, and as the remainder of this section demonstrates, the procedural continuum developed in Chapter 7 can be customised and expanded to demonstrate the likelihood of judicial mediation resulting in apprehended bias as follows:

⁶⁷ Patrick Lane, *Lane’s Commentary on the Australian Constitution* (2nd ed, 1998) 467. See also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 398 (Windeyer J).

⁶⁸ (2000) 205 CLR 337, 382-44 [6].

Figure 3: Likelihood of Judicial Mediation resulting in Apprehended Bias



Judicial participation

Judicial participation in mediations may range from being purely facilitative to evaluative in nature, and may involve the use of various techniques including reality testing and doubt creation.⁶⁹ As explained in the preceding Chapter, the limits of judicial participation (beyond which a reasonable apprehension of bias will arise) lie somewhere between the expression of 'tentative or exploratory'⁷⁰ views and

⁶⁹ See above Chapter 1 nn 51-53 and accompanying text.

⁷⁰ *Johnson v Johnson* (2000) 201 CLR 488, 493 [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

statements of opinion that indicate a ‘settled view’.⁷¹ The more evaluative or advisory a judge’s input (or the further into the red zone of the procedural continuum) the more likely it is that a judge’s words will be taken to indicate a settled view, and the more ‘reasonable’ this apprehension will be. Consider the following hypothetical scenario:⁷²

Plaintiff (P) has suffered a complex array of physical and psychological injuries as a result of the Defendant’s (D) negligence. D accepts liability, but denies legal responsibility to the full extent of P’s injuries due to the existence of various pre-existing injuries and intervening tortious acts. The facts do not give rise to any novel issues of law. Given the complexity of the case and the likelihood that both sides will lodge extensive evidence, the Judge attempts to mediate a settlement between the parties.

P is confident in his legal position and has demonstrated an unwillingness to make any concessions from his opening claim of \$2 million. D has indicated that he would be willing to compensate P up to the sum of \$1 million, but has shown a willingness to make further concessions. The judge estimates that the true value of the claim is somewhere in the region of \$1.2 million, and is concerned that the parties are rapidly approaching deadlock. She considers the following strategies to avoid this occurring:

⁷¹ *Re Watson; Ex parte Armstrong* (1976) 136 CLR 248, 264 (Barwick CJ, Gibbs, Stephen and Mason JJ).

⁷² This scenario was created with the assistance of the following sources in particular: Bond University School of Law Dispute Resolution Centre. John Wade, Laurence Boule and Pat Cavanagh, *The Mediation Process [videorecording]: Fletcher’s partnership dispute* (1992); and Jerome Levy and Robert Prather, *Texas Practice Guide: Alternative Dispute Resolution* (2005), Appendix A “Fly on the Wall”.

1. The facilitative approach

‘Ok, P, if I understand correctly, you estimate that you would be awarded somewhere in the region of \$2 million were this matter to be settled at trial? And, D, you estimate that P would be awarded considerably less? As you both know, nothing that is said here today will affect your prospects should you go to trial. So, P, if D were to make you an offer right now, just to start the ball rolling, what sort of figure might you be willing to consider?’

Note that in this instance the judge initially addresses herself to both parties, and her advice is intended merely to facilitate discussion. She does not reveal any opinion as to the parties’ respective positions.

2. The (soft) advisory approach

‘P, as a voice of reason and experience let me remind you that, were this matter to proceed to trial, you could walk away with a fraction of the amount that you claim today – or perhaps even nothing at all. I would advise you to consider whether you are willing to take this risk’.

Note that in this instance the judge has attempted to create doubt in the plaintiff’s position. Her advice is advisory in a sense, in that she has implicitly recommended that the plaintiff seek a settlement. However, she has not evaluated the substantive merits of the parties’ claims.

3. The (hard) evaluative approach

‘P, my experience as a judge is that plaintiffs in personal injury suits are rarely awarded an amount approaching their initial claim. That is the reality. There is often an assumption that figures are inflated by claimants to strengthen their bargaining position during the settlement process. Certainly, were this matter to be tried before me, I would likely take this view. I would strongly suggest, therefore, that you make some kind of concession in response to D’s earlier offers’.

Note that, once again, the judge has attempted to create doubt in the plaintiff’s position. However, in this instance she has also expressed her own views on those prospects, and has indicated that she is generally suspicious of the amounts claimed by plaintiffs in personal injury matters.

Putting aside the various mitigating strategies discussed in the following section, the probability of an appellate court finding a reasonable apprehension of bias increases as the judge moves from the facilitative model through to the (hard) evaluative model (from left to right on the procedural continuum). It is unlikely that a reasonable apprehension of bias would be sustained as a result of the facilitative approach. In that instance the judge has simply asked tentative or exploratory questions to enhance negotiation – none of what was said would appear to indicate bias. The same is almost certainly true of the (soft) advisory approach. While the judge’s statements are advisory they are not evaluative. They do not indicate any opinion whatsoever as to

the plaintiff's prospects of success. The most that could be said is that the judge has formed a settled mind as to the general pitfalls of litigation.

However, it is possible that the (hard) evaluative approach would give rise to a reasonable apprehension of bias.⁷³ In this instance the judge has indicated to the plaintiff that she has a pre-existing negative view of personal injury claimants. Whether the judge's comments would indicate a 'settled view' is a matter of contention. In *Vakauta v Kelly*, the trial judge had indicated a pre-existing view as to the reliability of expert medical testimony. In that instance the High Court found no bias to have arisen. As Brennan, Deane and Dawson JJ explained, it 'is inevitable that a judge who sits regularly to hear claims for damages for personal injury will form views about the reliability and impartiality of some medical experts who are frequent witnesses in his or her court'.⁷⁴ However, their Honour's went on to state that:

both necessity and common sense require that a distinction be drawn between the case where a judge has some preconceived views about the expertise or reliability of the professional opinions of an expert medical witness and the case where a judge has preconceived views about the credit or trustworthiness of a non-expert witness "whose evidence is of significance on ... a question of fact" which "constitutes a live and significant issue" in the case.⁷⁵

⁷³ At the same time, this approach may result in more frequent settlement, and this possibility should be taken into account as a matter of case management. See above Chapter 7 nn 247-69.

⁷⁴ *Vakauta v Kelly* (1989) 167 CLR 568, 571.

⁷⁵ *Ibid.*

An example of a case in which a judge had formed a preconceived view about the credibility of ‘live and significant’ evidence is *Ruffles v Chilman*.⁷⁶ In that case, the trial judge adjourned the trial and ordered the parties back to a prehearing mediation conference, to be conducted by a deputy registrar.⁷⁷ During the mediation the deputy registrar told the appellant that the trial judge ‘had formed a negative view of the appellant’s credit’.⁷⁸ The trial judge refused an application to recuse himself as, in his view, not only were the views expressed those of the deputy registrar alone, but the ‘proposition that a judge should disqualify himself because he has formed a view of the credibility of a witness after the evidence of that witness has concluded, is untenable. The judicial process works by judges forming views of witnesses as they give evidence’.⁷⁹ In a judgment delivered by Kennedy J, the Supreme Court of Western Australia disagreed, finding that the trial judge had ‘made no attempt to deny’ that what the deputy registrar had said was an accurate representation of his views, and that these views indicated prejudgment as to a specific matter to be determined during trial.⁸⁰ As these comments could be directly attributed to the trial judge, a reasonable apprehension of bias was found.

It is essential to appreciate, however, that *Ruffles v Chilman* turned on its own, unique, set of circumstances. These circumstances included the judge’s failure to assure that parties that he had not prejudged a live issue, and the fact that his comments attached to the credit of evidence pertaining to that issue. Neither of these factors is present in the (hard) evaluative approach posited in the hypothetical scenario above, which is

⁷⁶ *Ruffles v Chilman* (Unreported, Supreme Court of Western Australia, Kennedy, Franklin and White JJ, 19 May 1996).

⁷⁷ Ibid 6.

⁷⁸ Ibid 10.

⁷⁹ Ibid.

⁸⁰ Ibid 13.

closer to the category of ‘case where a judge has preconceived views about the expertise or reliability of the professional opinions’. However, such distinctions will not always be easy to draw. In *Bidner v Queensland*,⁸¹ the Supreme Court of Queensland considered whether a trial judge had ‘descended into the arena’ during a case management conference. The defendant submitted that the judge had effectively evaluated the plaintiff’s case and offered suggestions on how to improve their claim,⁸² and that a reasonable apprehension of bias had therefore arisen. On this basis the defendant requested that the judge recuse himself from trial. The trial judge refused to do so. McPherson and Thomas JJA, and Jones J, held that:

In the present case, we are not prepared to say that the primary judge overstepped the proper limits of case management, and, indeed, the defendant does not challenge what was done in that regard. There are, however, likely to be further difficulties and possible appeals if His Honour sits as the trial judge to hear and determine the plaintiff’s action. Having to some extent participated in reformulating the plaintiff’s claim against the defendant, as well as requests for particulars from the defendant, it is not desirable that the integrity of the trial process or its outcome should be placed at risk of costly challenge in the future.⁸³

⁸¹ [2000] QCA 368 (Unreported, McPherson and Thomas JJA, Jones J, 7 September 2000).

⁸² The Supreme Court summarised the trial judge’s conduct as follows: ‘[T]he learned judge commented on the differences of approach adopted by the two specialists in the reports of their examination and diagnosis of the plaintiff’s injury. The defendant had by then provided some further and better particulars, which were perused by His Honour. Having considered them, he told the plaintiff’s solicitor that there were various matters in those particulars about which the plaintiff needed more information, of which he gave detailed illustrations. His Honour then commented on the damages claimed by the plaintiff, and on what was needed to prove economic loss in the action. He suggested that the solicitor make a note of what he suggested should be adopted by way of pleading negligence as “an allegation in relation to which causation doesn’t play so great a part.”’ Ibid [4].

⁸³ *Bidner v Queensland* [2000] QCA 368 (Unreported, McPherson and Thomas JJA, Jones J, 7 September 2000), [10].

Thus, the Supreme Court's pragmatic solution to the possibility of apprehended bias or damage to the integrity of the Court was to avoid the question entirely; requiring simply that the judge be disqualified from further dealing with the matter:

There will on occasions be some difficulties in reconciling the functions of a judge acting in his or her traditional role in the adversarial system with the more recent evolution of a role as a judicial case manager. It is not possible, or perhaps appropriate, here to try to determine the proper limits of that function. Some matters, by reason of the very nature of the issues involved or the condition in which they are found to be, attract the use of strong measures and a firm hand; others do not. It is impracticable to attempt to define the proper limits of judicial activism in the abstract or to do so in advance in a way that might in the end prove to be either too stultifying or unduly liberating in the development of the case management function in future.⁸⁴

The Queensland Supreme Court's judgment in *Bidner* accepts that the boundaries of acceptable judicial practice are inherently flexible, and proposes that – save in extreme cases – appellate courts should refrain from providing lower courts with explicit guidance in the exercise of discretion. Nevertheless, in light of the authorities analysed above and in Chapter 7,⁸⁵ a conservative estimate would place the current upper limit of judicial participation somewhere to the left of the (hard) evaluative approach. This limit will vary between jurisdictions and in accordance with the nature

⁸⁴ *Bidner v Queensland* [2000] QCA 368 (Unreported, McPherson and Thomas JJA, Jones J, 7 September 2000), [9].

⁸⁵ See above Chapter 7 nn 247-69 and accompanying text.

of the rights and interests at stake.⁸⁶ It will also be increased if informed consent is obtained; a point examined in more detail below.

Privacy: separate meetings and private communications

In Chapter 1, it was explained that separate meetings are a variable feature of mediation in that, while some mediators will use them as a matter of course, others will not. Sir Laurence Street has argued that separate meetings lie ‘at the heart of a mediation process’.⁸⁷ In contrast, Laurence Boulle has observed that in ‘some training courses the separate meetings are presented as a routine and indispensable feature of the mediation process ... In other training systems separate meetings are presented as an optional variable, called only at the discretion of the mediator or at the request of a party’.⁸⁸ Likewise, Hilary Astor and Christine Chinkin note that some mediators never use separate meetings, and that others consider it vital that the ‘most significant interchanges’ take place in the presence of all parties.⁸⁹

The extent to which separate sessions are employed may also vary according to the experience of the mediator. John Wade has reported that a majority of experienced mediators ‘emphasise that the more experienced they become, the more they try to keep clients in joint meetings’.⁹⁰ In contrast, Wayne Brazil has stated (from his perspective as a US settlement-judge), that he does not usually:

⁸⁶ *National Companies and Securities Commission v News Corporation* (1984) 156 CLR 296, 314 (Gibbs CJ); *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

⁸⁷ Street, ‘Mediation and the Judicial Institution’, above n 32, 795.

⁸⁸ Boulle, above n 37, 209.

⁸⁹ Astor and Chinkin, above n 5, 267. See also David Spencer and Michael Brogan, *Mediation Law and Practice* (2006), 66-69.

⁹⁰ John Wade, ‘What skills and attributes do experienced mediators possess?’ (1999) 5 *Australian Dispute Resolution Bulletin* 50.

begin with a general session, attended by everyone, in which counsel, in *seriatim* and fairly predictable exercises, would set forth their client's positions. Instead, after my opening speech (and after answering any questions a participant might have), we most often proceed directly to private caucusing. Informed in each instance by these private meetings, I decide what information will flow from one side to the other.⁹¹

Mediators may also telephone or email disputants prior to the mediation session, in order to encourage the free flow of information, educate parties as to the nature and object of mediation, develop trust with the parties, and (in disputes involving multiple parties on either side) to discuss how decisions will be made.⁹² As with separate meetings, however, contact with the parties prior to mediation is not an essential feature of the mediation process:

Where time, resources and relevant protocol allows, some mediators have personal contact with each party individually before the mediation. This is more likely to occur in private mediations, and some experienced mediators always attempt to interview the parties in person before the mediation meeting.⁹³

⁹¹ Wayne Brazil, 'Professionalism and Misguided Negotiating', in Andrea Schneider and Christopher Honeyman (eds), *The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator* (2006), 697, 698-99. Separate meetings are a core feature of the classical mediation model, although, contrary to Wayne Brazil's practice, the classical model prescribes the use of the private meetings towards the end of the mediation process. Spencer and Brogan, above n 89, 49, 66-69.

⁹² Boule, above n 37, 178-79.

⁹³ Boule, above n 37, 178.

It will be recalled that neutrality (or impartiality) is a core feature of mediation,⁹⁴ just as it is an essential quality in the exercise of judicial power.⁹⁵ Thus, even in a purely private context separate meetings can be controversial, and mediators must take care to maintain trust if separate sessions are to be used.⁹⁶ Nevertheless, private mediators are not ordinarily subject to the formal requirements of procedural fairness.⁹⁷ In contrast, if a judge in ordinary trial proceedings were to hold separate meetings or communicate privately with one of the parties, a reasonable apprehension of bias might arise in the mind of the absent party.⁹⁸ In such circumstances it is not what a judge actually says or does which is in issue (as examined immediately above), but whether or not such meetings or communications give rise by their very nature to a reasonable apprehension of bias.⁹⁹ Sir Laurence Street suggests that they may do, because ‘private access to a representative of the court by one party, in which the dispute is discussed and views are expressed in the absence of the other party, is a repudiation of basic principles of fairness and absence of hidden influence’.¹⁰⁰ In terms, this proposition is unassailable, and well supported by the authorities.¹⁰¹ The

⁹⁴ NADRAC, *Alternative Dispute Resolution Definitions* (1997), 5; Landerkin and Pirie, above n 49, 256; Boulle, above n 37, 13; Sourdin, *Alternative Dispute Resolution*, above n 37, 26.

⁹⁵ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 362 [79] (Gaudron J); 382 – 383 [145 – 146] (Kirby J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

⁹⁶ See, for example, John Haynes, *The Fundamentals of Family Mediation* (1994), 62; Boulle, above n 37, 192.

⁹⁷ Boulle, above n 37, 149.

⁹⁸ *R v Lilydale Magistrates Court; Ex parte Ciccone* [1973] VR 122, 127 (‘*R v Lilydale*’). See also the comments of Wilson J in *Re Baird; Ex parte Aitco Pty Ltd* (1985) 62 ALR 244, 245 [10]: ‘Certainly it was quite wrong, in the circumstances, for the Commissioner to go into private conference with one only of the parties in the course of a hearing’.

⁹⁹ *Ibid.*

¹⁰⁰ Street, above n 37, 492. Sir Laurence suggested that judicial mediation would undermine public confidence in the judiciary, as opposed to the rule against bias per se. Public confidence, and this aspect of Sir Laurence’s argument, is discussed in more detail below. The same reasoning naturally applies to the rule against bias (in an individual context), however, as apprehended bias is determined objectively.

¹⁰¹ In addition to the cases analysed in this section, see *Kanda v Government of the Federation of Malaya* [1962] AC 322, 337.

classic expression of the relevant principle in Australia was provided by McInerney J in *R v Lilydale Magistrates Court; Ex parte Ciccone* ('*R v Lilydale*')

The sound instinct of the legal profession – judges and practitioners alike – has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.¹⁰²

Two important points should be made about the 'no communication principle' as expounded by McInerney J. First of all, this particular manifestation of the rule against bias has tended to be applied in cases that involve the parties (or third parties) instigating communications with judges as opposed to judges instigating communications with the parties.¹⁰³ It is nevertheless explicit in McInerney J's reasoning that the same principle will apply irrespective of who (the judge or one of the parties) actually instigates communication. Second of all, McInerney J's

¹⁰² [1973] VR 122, 127.

¹⁰³ In *Re JRL; Ex Parte CJL* (1986) 161 CLR 342, 346-47, Gibbs CJ stated that 'a judge should not, in the absence of the parties or their legal representatives, allow any person to communicate to him or her any views or opinions concerning a case which he or she is hearing, with a view to influencing the conduct of the case. Indeed, any interference with a judge, by private communication or otherwise, for the purpose of influencing his or her decision in a case is a serious contempt of court'.

reasoning draws a clear distinction between communications made without the knowledge of the other party, on the one hand, and with the consent of the other party, on the other. This point is considered in more detail in the following section. If it is assumed for the sake of argument that parties will *not* be required to provide informed consent, however, is it necessarily the case that private meetings or communications will undermine the rule against bias?

In *R v Judge Leckie; Ex parte Felman*, Gibbs J (as he then was) approved of the general principle as expounded by McInerney J in *R v Lilydale*, but clarified that it does ‘not mean that if a communication has been made to the judge on behalf of one of the parties the judge will necessarily and in all circumstances be disqualified’.¹⁰⁴ In such instances, Gibbs J explained, the ‘question remains whether the fact that such a communication has been made would raise a reasonable suspicion that the judge will not or cannot deal with the case fairly and impartially’.¹⁰⁵ The answer to this question will vary according to the circumstances in which the communication was made, including ‘the nature of the communication, the situation in which it took place, its relationship to the issues for determination and the nature of the disclosure made by the judge’.¹⁰⁶ In other words, as with judicial participation, whether private meetings undermine the rule against bias will vary according to the circumstances. This proposition is reflected in *Figure 3*, above. Which factors, then, will distinguish the circumstances in which separate meetings are permissible from the circumstances in which they are not?

¹⁰⁴ *R v Judge Leckie; Ex parte Felman* (1977) 52 ALJR 155, 158.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Re JRL; Ex Parte CJL* (1986) 161 CLR 342, 351 (Mason J).

In *Duke Group Ltd (in liquidation) v Alamain Investments Ltd*, ('Duke Group'),¹⁰⁷ the trial judge (Debelle J) had unsuccessfully attempted to mediate a dispute between the Duke Group (the plaintiff) and a firm of accountants who, it was alleged, had negligently prepared an Australian Stock Market report for the plaintiff. The mediation, which took place according to the *Supreme Court Act 1935* (SA), involved separate meetings between the parties and the judge. In a subsequent action, the plaintiff came before Debelle J in an unconnected dispute with Alamain Investments. The Duke Group applied to the court for Debelle J's disqualification on the basis that His Honour's 'participation in the mediation, and in particular the fact that [he] met privately with some of the directors, may have resulted in [his] receiving information which would cause [him] to have a view upon the merits of the action against the directors'.¹⁰⁸ His Honour duly recused himself, explaining, in language reminiscent of the views expressed by Sir Laurence Street, that:

When a judge acts as mediator, the judge sheds, as it were, the judicial mantle for the duration of the mediation and acts in a manner inconsistent with the role of a judge by seeing the parties in private. In doing so, the judge acts in a manner contrary to the fundamental principle of natural justice that a judge must not hear representations from one party in the absence of the other. It is for this reason that the judge will not in any respect adjudicate in that action except with the consent of the parties A reasonable bystander might apprehend that, in the course of meeting the directors separately, I might have received information which would cause me have a view about the merits of the claim ... In the result, I believe that what is at stake is the integrity of the

¹⁰⁷ [2003] SASC 272 (Unreported, Debelle J, 8 August 2003).

¹⁰⁸ *Duke Group Ltd (in liq) v Alamain Investments Ltd* [2003] SASC 272 (Unreported, Debelle J, 8 August 2003), [21].

Court engaging in two types of dispute resolution and the public interest in upholding the integrity of the Court and public confidence in the Court.¹⁰⁹

A number of points should be noted about this judgment. The first is that DeBelle J drew a clear distinction between subsequent adjudication undertaken with and without the consent of the parties. The second point is that DeBelle J recused himself not only to ensure impartiality in the case at hand, but to maintain the integrity of Court. Both of these points are considered later in this Chapter. The third point is that, while the grounds for disqualification ostensibly rested on the occurrence of separate meetings, it was in fact the disclosure of confidential information (extraneous information) during these separate meetings, and the prejudicial nature of the information disclosed, that caused DeBelle J to disqualify himself. The reference to separate meetings is a red-herring, drawing attention away from the real concern; that the judge was aware of wrongdoing on the plaintiff's part.¹¹⁰ If the holding of separate meetings had been the real issue, it would have been the absent party who apprehended bias, not the plaintiff. The issue of confidentiality and the impact of extraneous information are examined in the following section.

It follows that the *Duke Group* case does not stand as authority for the proposition that separate meetings or private communications will invariably undermine the rule against bias; merely that they may do so if prejudicial information is revealed to the judge. It seems axiomatic that the threshold of 'reasonable suspicion' necessary to activate the rule by virtue of separate meetings will be higher during prehearing than trial. As explained at length in Chapter 7, the level of communication between judges

¹⁰⁹ *Duke Group Ltd (in liq) v Alamain Investments Ltd* [2003] SASC 272 (Unreported, DeBelle J, 8 August 2003), [23], [28], [29].

¹¹⁰ *Ibid* [27].

and litigants is necessarily greater during prehearing, because judges are expected, amongst other things, ‘to simplify issues, make suitable amendments to the pleadings, limit the number of expert witnesses, obtain admissions of facts and generally prepare cases for trial’.¹¹¹ Recently, in *Anderson Group Pty Ltd v Tynan Motors Pty Ltd*, Young CJ recognised that

it is not uncommon for equity judges in proceedings where there is no factual dispute to telephone both counsel, mention a proposition or case which has not been dealt with in oral submissions, and ask whether they have anything to say about it by filing further written submissions. As counsel are not on the same telephone line, of necessity, each counsel will need to be telephoned separately. It is usually the judge that has to do the ringing because only he or she knows the legal intricacies of the point on which assistance is required. This practice is, I believe, efficient and does not break the general rule provided that the judge is satisfied that both counsel are aware that the other has been given an identical message.¹¹²

Young CJ’s comments provide some support for the provision of private communications at the very least. However, judicial mediations are not directly comparable with the manner of proceedings considered by Young CJ, as mediation is not typically concerned with issues of law or equity. In addition, His Honour’s reasoning is almost certainly limited to private communications involving managerial matters, because subsequent disclosure is necessary to dispel apprehended bias. *In Re JRL; Ex Parte CJL*, Mason J explained that ‘the terms of a subsequent disclosure by the judge of the communication and a statement of its effect in some, perhaps many,

¹¹¹ Law Reform Commission of New South Wales, above n 39, 19.

¹¹² (2006) 65 NSWLR 400, 142.

situations will be sufficient to dispel any reasonable apprehension that he might be influenced improperly in some way or other'.¹¹³ In this respect, the holding of separate meetings and the rule against bias are truly at loggerheads, as the content of discussions held in separate meetings cannot be disclosed to the other party (at least not without the disclosing party's consent). Confidentiality is often seen as an important feature of the mediation process, not least because it is the assurance of confidentiality which encourages the disclosure of information.¹¹⁴ As Philip Harter observes:

One of the central functions of mediation is to encourage the parties to speak candidly about their interests, needs, fears and desires. If a party has any concern over whether what it tells the mediator in confidence, or what it does in negotiations, might be revealed to its detriment, any rational party would not be as forthcoming – it would want to protect against revealing too much and hence maintain an adversarial position akin to litigation.¹¹⁵

The issues raised by confidentiality vis-à-vis impartiality are examined in the following section. As intimated at the beginning of this section, however, and further explained later in this Chapter, subsequent disclosure is not the only means by which the risks of apprehended bias can be minimised.

In summary, it is by no means certain that separate meetings or private communications will attract the rule against bias in the absence of informed consent.

¹¹³ (1986) 161 CLR 342, 351.

¹¹⁴ Ellen Deason, 'The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?' (2001-2002) 85 *Marquette Law Review* 79, 80-84.

¹¹⁵ Phillip Harter, 'Neither Cop nor Collection Agent: encouraging administrative settlements by ensuring mediator confidentiality' (1989) 41 *Administrative Law Review* 315, 324.

It is nevertheless preferable that informed consent be obtained as a matter of practice, not only as a means of mitigating the (minimal) risks posed by judicial mediation, but because informed consent is consistent with the concept of self-determination upon which mediation is founded.¹¹⁶ Obtaining informed consent will also help to ensure that the integrity of the judicial function is maintained. Both of these points are considered below.

The confidentiality of proceedings

The final pressure point in the relationship between mediation and the rule against bias arises because of the confidential nature of the mediation process. While confidentiality is not a core feature of mediation per se, Ellen Deason has pointed out that:

Confidentiality for mediation communications is regarded as fundamental to effective mediation ... Strong confidentiality protection is, in many instances, crucial to establishing working relationships within the mediation framework between the adversary parties and with the mediator.¹¹⁷

A mediator's duty of confidentiality has 'two dimensions'.¹¹⁸ First of all, a mediator may owe a duty of confidentiality to the parties collectively, as per the terms of the mediation agreement. Secondly, a mediator may owe a duty of confidentiality to the parties individually in respect of information revealed during separate meetings.¹¹⁹ A number of legal questions arise as a result of confidentiality in these areas. Most of

¹¹⁶ Ruth Charlton, *Dispute Resolution Guide Book* (2000), 8, 14 – 15; Boulle, above n 37, 60-67.

¹¹⁷ Deason, above n 114, 80. See also Harter, above n 115, 324-25.

¹¹⁸ Boulle, above n 37, 542

¹¹⁹ Boulle, above n 37.

these issues are common to mediation in general,¹²⁰ but may be exacerbated in the case of judicial mediation. For example, is information revealed during judicial mediation covered by the ‘without prejudice’ privilege?¹²¹ Is information provided to judge-mediators covered by legal professional privilege?¹²² Can judge-mediators be called upon as witnesses in respect of information revealed during mediation?

From a broader policy perspective these issues are of considerable importance to the question of whether judges should mediate, and it has also been argued that, if judges were required to appear as witnesses or directed to reveal information obtained in confidence, this could undermine the integrity of the judiciary.¹²³ These arguments are addressed briefly in the following section. Insofar as the impartiality limb of the judicial process implication is concerned, however, the question is not whether a mediator’s *duty to maintain* confidentiality raises problems when transplanted into a judicial context, but whether a *failure to ensure* confidentiality could result in apprehended bias. Melinda Shirley and Wendy Harris observe that:

The possible disclosure of a mediator's private notes gives rise to specific difficulties. It is clear that in anything other than the most basic negotiations,

¹²⁰ John Wade, ‘Mediation – Seven Fundamental Questions’ (2001) 86 *Svensk Jurist Tidning* 571.

¹²¹ The without prejudice privilege is in fact a rule of evidence, which holds that information revealed ‘without prejudice can only be revealed with the consent of the parties’ (*Field v Commissioner for Railways* (NSW) (1957) 99 CLR 285). The issue for the courts has been how far to extend the application of the principle. Examples of an expansive approach (in which the court found that public policy required information revealed in mediation to remain confidential) include *Lukies v Ripley* (no 2) (1994) 35 NSWLR 283, and *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280. The current position in Australia, as expressed by Rolfe J in *AWA Ltd v Daniels* (1992) 7 ASCR 752, [6], is that information revealed in mediation will be admissible if it can be ascertained ‘by admissible evidence, a fact to which reference was made at mediation, not by reference to the statement but to the factual material which sourced the statement’. See also; *Nodnara Pty Ltd v Deputy Commissioner of Taxation* (1997) 140 FLR 336; Fiona Crosbie, ‘Aspects of Confidentiality in Mediation: A Matter of Balancing Competing Public Interests’ (1995) 2 *Commercial Dispute Resolution Journal* 51, 53-59.

¹²² In *Baker v Campbell* (1983) 153 CLR 52, Murphy, Wilson, Deane and Dawson JJ held that legal professional privilege is not confined to judicial proceedings. See also Crosbie, above n 121, 59-64.

¹²³ Phillip Tucker, ‘Judges as Mediators: A Chapter III Prohibition?’ (2000) 11 *Australian Dispute Resolution Journal* 84, 91.

a mediator needs to keep notes in some form. Some mediators emphasise the importance of reducing issues to a simple visual form in assisting parties to separate themselves from the problem and work towards a solution. In other cases it may simply be that the mediator needs to keep notes of reactions, thoughts, strategies and ideas for personal reference to aid in the negotiation process. It is easy to imagine how such innocent personal notes could be misconstrued by parties after the event, as indicating a bias or interest towards one side.¹²⁴

It is always possible that information revealed in confidence during judicial mediation could be revealed. For example, a judge-mediator might inadvertently leave notes from a private session in the view of the other party, or notes from a joint session in an area of the courthouse accessible to other court-personnel. It is also possible that judge-mediators will discuss confidential information with other judges. For this reason, a rigid distinction is ordinarily maintained between a court's mediation and adjudication functions. This point is returned to below. As has been pointed out repeatedly in the preceding Chapters, however, mediation is by definition non-determinative in nature.¹²⁵ As long as judicial mediation results in a resolution of the dispute it will be immaterial whether or not a judge reveals (or hears) information that might prejudice his or her ability to remain impartial, because there will be no judicial decision in respect of which bias could be apprehended.¹²⁶ It might also be pointed out that judges are free to take notes during other prehearing processes, and for that matter during the trial process itself, and that these notes could just as easily indicate

¹²⁴ Melinda Shirley and Wendy Harris, 'Confidentiality in Court-Annexed Mediation – Fact or Fallacy?' (1992) 13 *The Queensland Lawyer* 221, 223, 223. See also Deason, above n 114, 83-84.

¹²⁵ Simon Roberts, 'Mediation in Family Disputes' (1986) 46 *Modern Law Review* 537, 546; Boulle, above n 37, 65; Sourdin, *Alternative Dispute Resolution*, above n 37, 26.

¹²⁶ Lane, above n 67, 467. See also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 398 (Windeyer J).

bias if revealed. Nor are judges generally prohibited from talking to other judges in relation to a matter before them. As Mason J noted in *Re JRL; Ex Parte CJL*, the rule against bias does not ‘debar a judge hearing a case from consulting with other judges of his court who have no interest in the matter or with court personnel whose function is to aid him in carrying out his judicial responsibilities’.¹²⁷

Nevertheless, difficulties may arise if a judge-mediator becomes privy to information that would not otherwise have been revealed in litigation, and which constitutes a ‘prejudicial but inadmissible fact or circumstance’.¹²⁸ Even if the judge-mediator does not subsequently adjudicate, the adjudicating judge may become aware of the same information in one of the ways outlined above. In either scenario, it is important to realise that the question is not whether a judge has, by virtue of things said or done, indicated to a party that he or she has prejudged the issue. Were this the complaint the relevant principles would be those relating to judicial participation, examined above. Rather, the question is whether mere knowledge of ‘extraneous information’ could prejudice the perception of the judge’s ability to bring an impartial mind to the resolution of the dispute.¹²⁹

In identifying the extraneous information category of bias in *Webb v The Queen*,¹³⁰ Deane J made reference to two cases in particular: *Livesey v New South Wales Bar Association*,¹³¹ and *Australian National Industries v Spedley Securities*.¹³² However,

¹²⁷ In *Re JRL; Ex Parte CJL* (1986) 161 CLR 342, 351 (Mason J).

¹²⁸ *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).

¹²⁹ Ibid. See also: *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Australian National Industries v Spedley Securities* (1992) 26 NSWLR 411.

¹³⁰ (1994) 181 CLR 41, 74. Deane J suggested that the extraneous information category of bias will also ‘commonly overlap’ with the ‘association’ category; that is to say, apprehended bias that arises through ‘some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings’.

¹³¹ (1983) 151 CLR 288.

in neither of these cases was bias apprehended merely because a judge was privy to extraneous information. The salient point in both of these cases was that the decision-maker had already decided matters related to key issues in dispute.¹³³ While this knowledge may have been extraneous in the sense that it pertained to evidence not submitted, it was the spectre of prejudgment that raised an apprehension of bias. In contrast, in *Duke Group* (the facts of which were outlined above) DeBelle J disqualified himself on the basis that potentially prejudicial information had been revealed during an earlier judicial mediation with the plaintiff. In DeBelle J's opinion, recusal was necessary despite the fact that

the mediation occurred more than nine years ago. I have no memory of the details. I have no notes. I believe that it is most unlikely that any submission in the course of these applications or anything appearing in any document would trigger any relevant recollection. The likelihood of is even more remote given that the claim against the present defendants was not in contemplation of the parties in early 1994.

In the particular circumstances of the case (and in particular the clear objections lodged by the plaintiff) DeBelle J's decision to disqualify himself was a pragmatic and sensible one. In the absence of a specific request for disqualification by one of the parties, however, it seems unlikely that mere knowledge, in the absence of an opinion, will activate the rule against bias. Put differently, information must have the potential

¹³² (1992) 26 NSWLR 411.

¹³³ In *Livesey v New South Wales Bar Association*, the judges had decided the relevant matter in a prior and unconnected case: 'The argument advanced on behalf of the appellant [was] that the views which their Honours had expressed in [their earlier judgments] both as to the credibility and credit of ... a witness ... created a situation in which a party (ie the appellant) or a fair-minded observer might reasonably doubt that the question involved in the proceedings against the appellant could be dealt with by their Honours without bias by reason of pre-judgment'. In *Australian National Industries v Spedley Securities*, the judge had indicated prejudgment during an interlocutory proceeding.

to be prejudicial in order to be ‘extraneous’ in the sense intended by Deane J. Judges will frequently have access to information (via the media, prior awareness or by word of mouth) relating to a matter before them that has not been formally disclosed during the trial process.¹³⁴ The civil justice system nevertheless assumes that judges will bring an impartial mind to the determination of the dispute.¹³⁵

Can the risk of apprehended bias be mitigated?

The preceding analysis demonstrates that conflict between judicial mediation and the rule against bias is by no means a *fait accompli*. This realisation is significant, as it further discredits the notion that mediation and adjudication are somehow dichotomous. Nevertheless, and as is the case with the judicial process generally, judicial mediation could result in apprehended bias if a judge exceeds the boundaries of acceptable conduct. This possibility can be minimised (if not eradicated) by ensuring the informed consent of parties, the confidentiality of any information revealed and, in certain circumstances, by preventing judges from adjudicating a dispute that they have attempted to mediate. In Chief Justice Black’s opinion:

[M]ediation takes place within a structure and according to rules that are obvious for all to see. There is nothing clandestine about mediation. If there is caucusing and private communication it occurs because the parties consent to it occurring in the course of a mediation to which they have consented and which they can terminate by withdrawing their consent. Their consent ought to be, and in the Federal Court is, informed consent. Part of the knowledge

¹³⁴ In certain instances, if a fact is so notorious or well-known, it may be ‘judicially noted’ without inquiry. However, judicial notice cannot be applied to a matter in dispute. See David Field, *Queensland Evidence Law* (2008) 49-53; John Forbes, *Forbes Law on Evidence* (3rd ed 1999) 18.

¹³⁵ *Johnson v Johnson* (2000) 201 CLR 488, 504-06 [46] (Kirby J).

upon which that consent is founded is the knowledge that the mediation is confidential, that the mediator will not adjudicate upon the case if it proceeds to trial and that the mediator will maintain confidentiality.¹³⁶

The following section examines each of these mitigating strategies in more detail, and suggests that it may be unnecessary, and indeed undesirable, to employ all three at once. Contrary to the approach generally adopted in Australia, and consistent with the conclusions drawn in the preceding section, it is argued that judge-mediators should be able to adjudicate if mediation fails; subject to the general criteria for disqualification.

Obtaining informed consent is arguably the single most important strategy that can be adopted to mitigate the risk of apprehended bias arising as a result of judicial mediation; a proposition endorsed by a number of the judgments already discussed. As McInerney J noted in *R v Lilydale*, for example, judicial officers should avoid private communications, ‘without the previous knowledge and consent of the other party’.¹³⁷ The same principle will apply regardless of the manner in which bias is apprehended, and consent may be implied by a party’s failure to object to a judge’s continued participation. In *Vakauta v Kelly*, Brennan J (as he then was), Deane and Gaudron JJ stated that:

Where [a judge’s comments] are likely to convey to a reasonable and intelligent lay observer an impression of bias ... a party who has legal representation is not entitled to stand by until the contents of the final

¹³⁶ Chief Justice Michael Black, ‘ALJ Forum: Mediation’ (1993) 67 *Australian Law Journal* 941, 942.

¹³⁷ [1973] VR 122, 127.

judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object. The reason why that is so is obvious. In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had then been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing. It would be unfair and wrong if failure to object until the contents of the final judgment were known were to give the party in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a situation in which it was likely that the judgment would be allowed to stand only if it proved to be unfavourable to him or her.¹³⁸

A similar qualification was made by Mason, Murphy, Brennan, Deane and Dawson JJ in *Livesey v New South Wales Bar Association*.¹³⁹ In that case, the High Court determined that a refusal by two judges to disqualify themselves from hearing an appeal in the NSW Court of Appeal led to a reasonable apprehension of bias in the circumstances; namely that certain of the evidence central to the appeal concerned a matter previously determined by those judges in an earlier (albeit unconnected) hearing. In a unanimous judgment, the High Court explained that:

¹³⁸ (1989) 167 CLR 568, 572.

¹³⁹ (1983) 151 CLR 288.

[E]ach case must be determined by reference to its particular circumstances. It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances *or consent of the parties*, a fair-minded observer might entertain a reasonable apprehension of bias by reason of pre-judgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact.¹⁴⁰

These judgments indicate that consent will ordinarily be sufficient to allow a judge who would otherwise have been disqualified to hear a matter at trial. Of course, there may be cases where it is inappropriate for apprehended bias to be waived, regardless of the parties express or implied consent (for example, if the matter to be determined involves novel questions of law or matters of constitutional interpretation). As Enid Campbell has explained:

The rule against bias, it needs to be remembered, has been developed not only for the benefit of the parties to litigation. It is also meant to sustain public confidence in the courts of justice ... In practice there could be many cases in which the parties will have waived their right to object to the participation of a particular judge in the case on the ground of the judge's disqualification. Many such cases would probably not receive public notice. But from time to time cases will arise which, from the outset, attract considerable publicity What are members of the public likely to think when it then becomes known that the litigants have waived the

¹⁴⁰ *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 300 (*emphasis added*).

disqualification? Might not their confidence in the administration of justice be a little shaken?¹⁴¹

Public confidence is no longer a free-standing measure of constitutional validity (a point made clear in Chapters 4 and 6, and examined further in the following section), but this does not undermine Enid Campbell's suggestion that apprehended bias should be exempt from waiver in cases of public interest or cases which involve novel issues of law. However, no firm and fast rule can be formulated to determine when the public interest will be so great, or a question of law sufficiently important, to override an individual's consent to waiver.¹⁴² Such concerns can only be addressed by individual judges on a case by case basis, as already occurs as a matter of course.

In addition to obtaining informed consent, any risk of bias being apprehended will be reduced by maintaining as rigid a separation as possible between a court's mediation functions, on the one hand, and its adjudication functions, on the other. In practice, this strategy can involve the adoption of one or both of two distinct requirements. First of all, information obtained during mediation can be isolated from other court files during mediation and shredded upon completion. This is common practice in mediation generally,¹⁴³ and helps to ensure both the fact and appearance of confidentiality and to limit the opportunity for potential adjudicators to become aware of information revealed during mediation.¹⁴⁴ Second of all, judges can be

¹⁴¹ Campbell, above n 66, 42-43. The author notes that US legislation (28 USCA s455(e)) has been implemented which prohibits the waiver of disqualification for bias.

¹⁴² Although public interest will generally be higher in criminal matters and, as Isaacs J made clear in *Dickason v Edwards*, even 'in a public prosecution a party may waive the objection [to apprehended bias]'. (1910) 10 CLR 243, 260.

¹⁴³ *Commonwealth Bank of Australia v McConnell* (1997) (Unreported, Rolfe J, 24 July 2007); Scott Petterson, 'To keep or not to keep – is that really the question?' (2004) 6(9) *ADR Bulletin* 177.

¹⁴⁴ According to Ellen Deason, 'when a dispute in mediation is also the subject of a lawsuit, confidentiality provisions perform an important role by keeping the judging function separate from the

automatically disqualified from adjudicating disputes that they have attempted to mediate. This requirement removes any possibility that things said or done by a judge-mediator might lead to claims of apprehended bias – because he or she will have nothing to do with the final decision. In a presentation to the Victorian Bar, Justice Louise Otis explained (with reference to the judicial mediation program operated in the Quebec Court of Appeal) that

because of the duty of confidentiality, we put up a wall between the mediation system and the formal system. The files are kept apart in the office of the judge-mediator and will be eventually shredded at the end of the mediation. If the case is not settled at the closing of the mediation session, of course, the judge is excluded from the panel in charge of the hearing.¹⁴⁵

Both of these requirements have been adopted in the NSW District Court. As to the first, Judge Margaret Sidis states that, all ‘notes taken by the judge are shredded at the conclusion of the mediation, and only ‘the signed agreement will remain on the court file as evidence of the commitment to confidentiality’.¹⁴⁶ Similar practices may be adopted in other Australian jurisdictions, although this is not made explicit in the enabling court rules or practice directions. In any event, it is debatable whether this requirement is truly necessary to ensure impartiality. Judges are already privy to confidential information in certain circumstances, without any need for paper shredding or the erection of metaphorical ‘walls’ within the court. This may occur, for

mediation function. This separation is especially important for court annexed mediation programs or referrals from other decision-making bodies, because the referral links these functions more closely than when a privately mediated dispute is later litigated’. Above n 114, 83.

¹⁴⁵ Otis, ‘Judicial Mediation: Prospects and Issues’, above n 50.

¹⁴⁶ Sidis, above n 15.

example, in instances of claimed public interest immunity.¹⁴⁷ Nevertheless, it is the ‘apprehension’ of bias that is important. With this in mind, and given that confidentiality is an important aspect of the mediation process and that mediators generally destroy notes after mediation in any event, it seems advisable to take all reasonable steps to apply this requirement in practice.

The second requirement, that a judge who has attempted to mediate a dispute should be excluded from adjudication,¹⁴⁸ is reflected in section 65(5) of the *Supreme Court Act 1935* (SA). This requirement is also applied in the NSW District Court, where the ‘judge will not hear the case if the mediation is not successful’, and the file will be marked; “Not to be Listed before Judge X.”¹⁴⁹ Automatic disqualification does not appear to be a formal requirement in other jurisdictions, but would be consistent with *Ruffles v Chilman*, discussed above, in which Kennedy J stated that:

The integrity of [the mediation] process is of critical importance. This requires that there should be no communication between the mediator on the one hand and the judge who either will be hearing, or is hearing, the action. If this requirement is not observed, confidence in the process of mediation is likely to be seriously compromised.¹⁵⁰

The requirement that judge-mediators be disqualified from taking a matter to trial is also supported by *Bidner v Queensland* (discussed above), in which the Supreme Court of Queensland found it unnecessary to determine whether a reasonable

¹⁴⁷ *Duncan v Cammell Laird & Co. Limited* [1942] AC 624, 641-2 (Viscount Simon LC); *Sankey v Whitlam*, (1979) 142 CLR 1, 44 (Gibbs ACJ);

¹⁴⁸ Tucker, above n 123, 85-86.

¹⁴⁹ Sidis, above n 15.

¹⁵⁰ *Ruffles v Chilman* (Unreported, Supreme Court of Western Australia, Kennedy, Franklin and White JJ, 19 May 1996), 14.

apprehension of bias had arisen, by requiring simply that the trial judge be disqualified from hearing the parties at trial.¹⁵¹ This requirement is also consistent with the 'Guide to Judicial Conduct' produced by the Council of Chief Justices of Australia, which states that:

The statutory obligation of confidentiality binding upon a mediator, and the withdrawal of the judge from the trial or an appeal, if the mediation fails, should enable a qualified judge to act as a mediator without detriment to public expectations of the judiciary.¹⁵²

Despite the fact that automatic disqualification will effectively eradicate any danger of apprehended bias arising (because the rule against bias only applies to judicial decisions), an approach which leaves recusal to the discretion of individual judges is, in the current writer's view, preferable. Historically, the mechanism employed to prevent and remedy the occurrence of apprehended bias in comparable circumstances has been to require disqualification only when necessary in the circumstances.¹⁵³ In

¹⁵¹ *Bidner v Queensland* [2000] QCA 368 (Unreported, McPherson and Thomas JJA, Jones J, 7 September 2000).

¹⁵² Australia and New Zealand Council of Chief Justices, *Guide to Judicial Conduct* (2002), 17. This advice would appear to address the requirements of judicial integrity, as opposed to the rule against bias per se, and it may be that the Council of Chief Justices envisages no particular difficulties arising in the latter context. In Quebec, a strict separation is enforced between judge mediators and judge adjudicators, so that in a number of cases judge adjudicators are not even aware that mediation has been attempted (Otis, 'Judicial Mediation: Prospects and Issues', above n 50. Judicial mediation may be distinguished from the LAT process in this respect because, judges who have made a determination, finding or order in the course of a LAT hearing are not excluded from ultimately determining the dispute (*Family Law (Shared Parental Responsibility) Amendment Act 2006*, s 697R (3)). David Spencer has also concluded that while, 'there is no doubt that mediation requires mediators to breach the rules of procedural fairness by the conduct of separate sessions where one party to the dispute is excluded from discussions between the mediator and the other party, safeguards are generally put in place to ensure that that particular judicial officer has no communications with judicial officers conducting any subsequent trial'. Spencer, above n 31, 139. See also Justice Michael Moore 'Judges as Mediators: A Chapter III Prohibition or Accommodation?' (2003) 14 *Australian Dispute Resolution Journal* 188, 194.

¹⁵³ See, eg; *Dimes v Proprietors of the Grand Junction Canal* (1852) 10 ER 301, 315 (Lord Campbell); *Allinson v General Council of Medical Education and Registration* (1894) 1 QB 750, 758; *R v Judge Leckie* (1977) 52 ALJR 155, 158.

Allinson v General Council of Medical Education and Registration, Lord Esher MR distinguished between disqualification for pecuniary interest (which is automatic in England) and disqualification for what he termed ‘incompatibility’ (which is not automatic):

The principle, then, is plain that if the Judge is disqualified he must not even be present during the hearing of the case ... If it is incompatible for the same man at once to be judge and to occupy some other position which he really has in the case, then he must not *prima facie* act as judge at all. He cannot be *both* accuser and judge. That is a fundamental and essential principle of justice ... Whether this incompatibility exists depends on the facts of the particular case.¹⁵⁴

This passage has been approved on a number of occasions in Australia,¹⁵⁵ although following the High Court’s decision in *Ebner v Official Trustee* a distinction is no longer drawn in Australia between pecuniary and non-pecuniary interests.¹⁵⁶ That the rule against bias can only be determined by reference to the unique circumstances at hand is consistent with the fact that certain factors (such as consent) will ordinarily remove the need for disqualification. Moreover, were judges to be automatically disqualified whenever a party claimed an apprehension of bias, this could ‘encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour’.¹⁵⁷

¹⁵⁴ (1894) 1 QB 750, 758.

¹⁵⁵ See, for example, *Dickason v Edwards* (1910) 10 CLR 243, 258 (Isaacs J); *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 260-61 (Barwick CJ, Gibbs, Stephen and Mason JJ).

¹⁵⁶ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 356-57 [54]-[55] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 366-67 [92]-[98] (Gaudron J), 381-90 [141]-[163] (Kirby J dissenting).

¹⁵⁷ In *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352, Mason J explained that, although ‘it is important that justice must be seen to be done, it is equally important that judicial officers discharge

Rather than reflecting any inviolable principle of procedural fairness, therefore, the automatic disqualification of judge-mediators is simply a pragmatic response to general uncertainty regarding the limits of acceptable judicial conduct. A similar approach has been adopted in relation to the performance by judges of inherently executive functions (*personae designata*). In *Grollo v Palmer*, Brennan CJ, Deane, Dawson and Toohey J stated that:

[A]s with the courts in the United States, the argument [that the issue of telecommunications intercept warrants undermines the appearance of impartiality] can be met by the adoption of an appropriate practice. A judge who has issued a warrant in a particular matter can ensure that he or she does not sit on any case to which the warrant relates. That is the practice followed when a judge has received information extra-curially which might prove embarrassing to the impartial hearing and determination of a case. Of course, the risk of such a situation arising and, in particular, of a judge discovering late in the day that he or she had issued a warrant on the basis of which evidence is to be tendered, is increased when there are but few judges appointed to a Court ... But that is a matter for individual judges.¹⁵⁸

This approach makes sense when the functions to be performed are closely connected to the executive, and where there is a real threat to the judiciary's perceived independence from the government. However, judicial mediation does not raise any

their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour'. See also *Attorney General of New South Wales v Klewer* [2003] NSWCA 295 (Unreported, Mason P Meagher JA, and Davies AJA, 15 October 2003); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 348 [19]-[23] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

¹⁵⁸ (1995) 184 CLR 348, 366.

such concerns.¹⁵⁹ Moreover, automatic disqualification seems to assume that judicial mediation will, in all instances, undermine the rule against bias. Once it is accepted that rigid distinctions between judicial mediation and other prehearing processes are untenable, the argument that judge-mediators should automatically recuse themselves dissolves. Judges are not *ipso facto* disqualified from hearing a matter at trial if they participate in other prehearing events, and there is no compelling reason why judicial mediation should be treated any differently. The discretionary approach has proven sufficient to date, and is consistent with principles of proportionality and good case-management practice.¹⁶⁰ The *raison d'être* of the Individual Docket System – operated by the Federal Court and favoured by the ALRC – is that cases should be managed by the same judge from commencement to disposition,¹⁶¹ and (as explained at length in Chapter 7) in most Australian jurisdictions:

¹⁵⁹ See above Chapter 5 nn 115-18.

¹⁶⁰ Proportionality simply refers to the striking of 'an appropriate *balance* or *relationship* between key factors in the legal process'. Susan Campbell, 'Proportionality in Australian civil procedures: a preliminary review' 14 (3) *Journal of Judicial Administration* (2005) 144, 144. In this sense, proportionality has its roots in the writings of jurists such as John Rawls (John Rawls, *A theory of justice*, 1971) and Ronald Dworkin (Ronald Dworkin, *A matter of principle*, 1985). This concept was central to Lord Woolf's Final Report in England and Wales, and has since been adopted in England and Wales by the *Civil Procedure Rules 2005* (England and Wales), s 1.1. According to Adrian Zuckerman, an overall effect of the English and Welsh *Civil Procedure Rules* is that 'judges must ensure that the resources given to individual disputes are proportionate to the complexity and importance of each dispute. In so doing judges must take into account not only the interests of the litigants before the court, but also the interests of all others waiting in the queue'. Adrian Zuckerman, 'Justice in crisis: Comparative dimensions of civil procedure' in Adrian Zuckerman (ed) *Civil justice in crisis: Comparative perspectives of civil procedure* (1999). The proportionality principle as set out in the English and Welsh *Civil Procedure Rules* has also been criticised, however, 'for permitting a broad and unguided discretion in the judiciary and for lacking practical means for ascertaining, for example, the importance of a case or the financial position of the parties'. Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) 46.

¹⁶¹ The ALRC has provided tacit support for the adoption of a proportionality principle in Australian federal courts, noting that 'the task [of courts] is to strike an effective balance between the concerns for individualised justice and for efficient use of limited public resources across the system', but has stopped short of positively advocating the adoption of a proportionality principle on the basis that the determination of court procedures is the constitutional preserve of the judiciary. Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, ALRC Report No 89 (2000), [1.95].

The obligations of judges, and of courts as institutions, are not limited in their content to the way in which the individual litigants whose cases are currently under consideration are treated. Courts also have obligations to other litigants whose cases are in the lists awaiting hearing, and to the community. What may be a proper course when considered in the narrower context may take on a different aspect when considered in the wider context.¹⁶²

It is not suggested that judge-mediators should, in all instances, adjudicate a dispute if mediation fails. If a judge-mediator has expressed a settled view on a matter, or communicated privately with the parties to an extent greater than the rule against bias will allow, then recusal will ordinarily be necessary in accordance with principles of general application.¹⁶³ However, if a judge has neither said nor done anything that could raise a reasonable apprehension of bias and the parties have consented to his or her adjudication of the dispute, then why should the expeditious determination of the matter by the judge-mediator not be encouraged?

It should also be borne in mind that appellate courts will not disturb an inferior court's order/decision unless it is manifestly wrong.¹⁶⁴ This is especially so in matters

¹⁶² *Australian National Industries v Spedley Securities* (1992) 26 NSWLR 411 (Gleeson CJ). See also *Re Watson; Ex parte Armstrong* (1976) 136 CLR 248, 258-63 (Barwick CJ, Gibbs, Stephen and Mason JJ). Most Australian jurisdictions have now introduced 'overriding objectives' in their rules of civil procedure. See above Chapter 7 n 130. From a timeliness perspective this appears to have had a positive impact in Queensland at least. Bernard Cairns and Stephen Williams, 'Pace of Civil Litigation in the Queensland Supreme Court' (2005) 24 *Civil Justice Quarterly*, 337.

¹⁶³ Justice Michael Moore has reached a similar conclusion, observing that there is 'always the risk that if mediation fails then, consistent with what I believe ought to happen which is reflected in the Guide to Judicial Conduct, the judge will no longer have any involvement with the case. But the assessment of that risk would be for the judge to make aided by the submissions of the parties'. Moore, above n 152, 197.

¹⁶⁴ *House v The King* (1936) 55 CLR 499, 504 - 505 (Dixon, Evatt and McTiernan JJ). *Norbis v Norbis* (1986) 161 CLR 513, 518 - 519; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 47 - 48. *Sali v SPC Ltd* (1993) 116 ALR 625, (Toohey and Gaudron JJ). See also Bernard Cairns, *Australian Civil Procedure*, (7th ed, 2007), 542.

of procedure,¹⁶⁵ ‘which, ordinarily, are best left to the court seized of the proceedings’.¹⁶⁶ French J (as he then was) has suggested that the increasing use of case management systems means that appellate courts must apply this presumption ever more strictly so as to avoid undermining the authority and efficiency of inferior courts,¹⁶⁷ and Sir Anthony Mason has explained that judges ‘enjoy having a judicial discretion and the more so because appeals from exercises of judicial discretion are problematic. Indeed, appellate courts are reluctant to intervene in an interlocutory matter and even more so when it is a matter of procedure’.¹⁶⁸

For the most part, therefore, the extent to which judges can ‘mediate’ will be a matter for individual judges to determine for themselves. Only if a judge exercises a discretionary power to mediate in a manner which is manifestly unfair will an appellate court intervene. On the (very) rare occasion that this occurs, any decision or order tainted thereby will be invalid for ‘jurisdictional error’¹⁶⁹ (as a decision made in the absence of procedural fairness is not a decision made according to law).¹⁷⁰ A decision so affected will be remitted for retrial, thereby signalling to the lower courts

¹⁶⁵ *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170.

¹⁶⁶ *Sali v SPC Ltd* (1993) 116 ALR 625, 632 (Toohey and Gaudron JJ).

¹⁶⁷ *Bomanite Pty Ltd v Slatex Corp Aust Pty Ltd* (1991) 32 FCR 379, 391.

¹⁶⁸ Mason, above n 7.

¹⁶⁹ The distinction between ‘jurisdictional error’ and ‘error in the exercise of jurisdiction’ can be subtle. According to Kirby J, ‘the boundary between error regarded as “jurisdictional” and error viewed as “non-jurisdictional” is, to say the least, often extremely difficult to find’. *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 123 [211]. However, according to Hayne J in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [163], there ‘is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on her or him, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction ... The former kind of error concerns departures from limits upon the exercise of power the latter does not’. Chief Justice James Spigelman provides a useful exploration of this issue in ‘Jurisdiction and Integrity’ (Speech delivered at the 2004 National Lecture Series for the Australian Institute Of Administrative Law, Adelaide, 5 August 2004).

¹⁷⁰ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 67 [26] (Gleeson CJ and Hayne J). See also *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

that the boundaries of judicial conduct have been exceeded, and providing guidance for judges in future mediations.

One final point should be made. The fact that the rule against bias is an implied requirement of Ch III does not affect the operation of that rule in practice. All that can be said is that Ch III prohibits judicial mediation when it undermines the rule against bias at common law, and that lawmakers (federal, State or territory) cannot remove this requirement. Unless a statute were to require a court conducting judicial mediation to undermine the rule against bias, in language that incontrovertibly removed its capacity to act judicially, no systemic invalidity could be established in this context. This is so, despite the fact that the rule against bias invariably takes account of public perceptions. Herein lies the essential distinction between procedural fairness and the integrity principle; the former exists ‘to repair individual infractions in particular cases’,¹⁷¹ whereas the latter operates to remedy complaints that are more ‘fundamental in character and concerned [with] the validity of institutional arrangements’.¹⁷² That being so, might the integrity principle hold additional and discrete consequences for the development of judicial mediation?

Will judicial mediation undermine the integrity of the judiciary?

This section considers whether judicial mediation might undermine the integrity of the Australian judiciary. In so doing, it draws together the conclusions reached in Chapter 4 regarding the integrity component of the judicial process implication

¹⁷¹ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 133 [225] (Kirby J).

¹⁷² *Ibid.*

(which applies to Ch III courts),¹⁷³ Chapter 5 in respect of the *persona designata* exception,¹⁷⁴ and in Chapter 6 regarding the concept of institutional integrity central to the *Kable* doctrine (which applies to State and territory courts).¹⁷⁵ It is concluded that judicial mediation is highly unlikely to undermine the integrity of the judiciary in any of these contexts.

Sir Laurence Street has argued that:

A court that makes available a judge or registrar to conduct a true mediation is forsaking a fundamental precept upon which public confidence in the integrity and impartiality of the court system is founded ... It is not enough for a court so to arrange internal working that the judge or registrar who has mediated will have no further connection with the case if it is not settled. The public sees a court as an integrated institution – indeed this is to be encouraged.¹⁷⁶

As noted above, Sir Laurence's arguments assume that mediation will involve separate meetings, which may not be the case. However, the same rationale will apply regardless of the manner in which impartiality is undermined. The essence of Sir Laurence's argument is that mediation is so fundamentally at odds with the basic requirements of impartiality that allowing judges to engage in the practice would undermine the 'integrity' of the judiciary.¹⁷⁷ Sir Laurence suggests that the public

¹⁷³ *Nicholas v The Queen* (1998) 193 CLR 173.

¹⁷⁴ See above Chapter 5 n 39-104 and accompanying text.

¹⁷⁵ *Kable v DPP* (NSW) (1996) 189 CLR 51.

¹⁷⁶ Street, 'Mediation and the Judicial Institution', above n 32, 795-96.

¹⁷⁷ Mason J lends support Sir Laurence's view that private meetings could undermine integrity: 'As McInerney J pointed out (in *Lillydale*), the receipt by a judge of a private communication seeking to influence the outcome of litigation before him places the integrity of the judicial process at risk. A

would be unable to distinguish between judges acting as mediators and judges acting as adjudicators, and that maintaining a wall between these functions would be insufficient to mitigate this danger. It is also implicit in Sir Laurence's reasoning that the requirements of integrity will extend equally to federal, State, and perhaps even territory courts.

Adopting a different constitutional approach, but drawing on substantially similar concerns, Phillip Tucker has argued that:

A vast gulf exists between the courts' traditional processes and mediation processes. This gulf stems from the basic premise that mediation is a private, flexible processes resulting (hopefully) in private agreement negotiated by the parties, whereas the court's processes are almost always public, rigidly methodical, and result in court's imposing resolution of the dispute upon the parties. Whilst the privacy of mediation is one of its inherently attractive features for a great many disputants, it is a two-edged sword because it leaves open to doubt that any agreement reached was free from unfair practices ... Judges' conduct of mediations would, it is submitted, pose a very real threat to the "bubble of impartiality" that surrounds the judiciary and which is essential in maintaining the legitimacy of its decisions.¹⁷⁸

As regards the rule against bias, these concerns were addressed in the preceding section. The crux of Phillip Tucker's argument, however, is that there is 'an impermissible incompatibility between a judge acting as a mediator and the judicial

failure to disclose that communication will seriously compromise the integrity of that process'. *Re JRL; Ex Parte CJL* (1986) 161 CLR 342, 351.

¹⁷⁸ Tucker, above n 123, 94; citing Alexander Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian judge' (1992) 21 *Federal Law Review* 48, 68-70.

function'.¹⁷⁹ In Chapter 5, it was argued that this proposition is premised upon a misconception of the *persona designata* exception; which will only apply in respect of inherently executive functions (which mediation does not appear to be).¹⁸⁰ Moreover, and as demonstrated consistently throughout this Chapter and the preceding Chapter, the judicial process is far from being 'rigidly methodical'. Phillip Tucker's arguments nevertheless reinforce the primary concern raised by Sir Laurence; that judicial mediation would involve a detrimental blurring of judicial and private dispute resolution roles and functions. He further suggests that judicial mediation could undermine the integrity of the judiciary if judge-mediators are required to appear as witnesses, or to reveal information gained in confidence during mediation.¹⁸¹

Before addressing these suggestions, it is important to re-emphasise the fact that law in this area is clouded by continuing uncertainty as to the relationship between the judicial process implication, the *persona designata* exception, and the *Kable* doctrine. While in all instances the rationale of the integrity concept would appear to lie in maintain the institutional or systemic legitimacy of the courts, the precise meaning of the term is not (necessarily) interchangeable between contexts. Not only do these doctrines rest on discrete constitutional foundations,¹⁸² they serve subtly different purposes. The judicial process implication and the incompatibility condition affecting the *persona designata* exception seek, *inter alia*, to maintain the integrity of Ch III courts.¹⁸³ In contrast, institutional integrity operates to ensure the integrity of the federal judicial system, by imposing some (but not all) of the requirements of the

¹⁷⁹ Moore, above n 152, 189.

¹⁸⁰ See above Chapter 5 nn 105-18.

¹⁸¹ Tucker, above n 123, 91-93.

¹⁸² The judicial process implication is an implication of the separation doctrine. The *Kable* doctrine is an aspect of the incompatibility doctrine.

¹⁸³ *Nicholas v The Queen* (1998) 193 CLR 173, 208 [73] (Gaudron J), 222 [115] (McHugh J), 258 [201], 265 [213] (Kirby J).

separation doctrine on State and territory courts.¹⁸⁴ As such, the High Court may apply the principles of integrity differently in respect of Ch III courts and judges, on the one hand, and State and territory courts, on the other.

Nevertheless, it seems highly unlikely that judicial mediation will fall foul of the integrity requirements applicable to any Australian court or judge. There are three reasons for this conclusion. The first is that judicial mediation is unlikely to undermine the criterion of integrity (public confidence/impartiality).¹⁸⁵ The second is that the integrity concept has rarely been (and is unlikely to be) applied.¹⁸⁶ The third is that judicial mediation would appear to be consistent with the overarching object of the separation doctrine and the *Kable* doctrine.¹⁸⁷

Perceptions of impartiality

It should be recognised that Sir Laurence and Phillip Tucker were both writing before the public confidence test had finally receded into a broader requirement of institutional independence and impartiality.¹⁸⁸ While public confidence is no longer to be considered a free-standing measure of integrity in either a federal or State/territory context, however, it is evident that public perceptions of the judiciary remain an indicator of institutional integrity, whatever language is used to express

¹⁸⁴ *Kable v DPP* (NSW) (1996) 189 CLR 51, 107 (Gaudron J), 114-15 (McHugh J), 143 (Gummow J).

¹⁸⁵ See above Chapter 4 nn 187-211, Chapter 5 nn 107-119, Chapter 6 nn 137-219, and accompanying text.

¹⁸⁶ See above Chapter 4 nn 212-47, Chapter 6 nn 225-46, and accompanying text.

¹⁸⁷ See above Chapter 4 nn 10-46 and accompanying text, and Chapter 6 generally.

¹⁸⁸ The idea that public confidence represents a discrete test of constitutional validity was gradually eroded throughout a series of cases: *Nicholas v The Queen* (1998) 193 CLR 173, 197 [37] (Brennan CJ), 275 [242] (Hayne J); *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 593 [23] (Gleeson CJ), 617-18 [102] (Gummow J), 629-30 [144] (Kirby J); *Baker v The Queen* (2004) 223 CLR 513, 519 [6] (Gleeson CJ), 542 [79] (Kirby J).

this fact.¹⁸⁹ Strictly speaking the appropriate question is whether an ‘informed observer’ of judicial mediation would ‘reasonably conclude that the institution no longer is, and no longer appears to be, independent and impartial,’¹⁹⁰ but in reality this question amounts to substantially the same thing as the public confidence test which it replaces. In Justice Michael Moore’s opinion, however:

[I]t is not difficult to conceive of measures that can be put in place within a court, perhaps underpinned by legislative provisions and rules of court, to ensure that a judge who has acted as a mediator had no involvement with the further conduct of the litigation if mediation was unsuccessful. For my part, I doubt that, in the face of such measures, there would be a public perception that the measures would not be effective. In any event it is difficult to conceive that a judge who had acted as a mediator might later hear the matter without violating established principles concerning the perception of bias (other than, perhaps, where there have been waiver by the parties).¹⁹¹

It has already been argued that the automatic disqualification of judges may be unnecessary to prevent apprehended bias, for the very reason posited by Justice Moore. As to public perceptions of judicial mediation and judicial integrity, Chief Justice Black has similarly argued that:

A court may indeed be viewed as an integrated structure for many purposes but it does not follow that a communication to a registrar can be seen to be a communication to the members of the court as a whole, or to all other

¹⁸⁹ Campbell, above n 66. *Baker v The Queen* (2004) 223 CLR 513, 542 [79] (Kirby J); *Rafael Cezan v The Queen* (2008) 236 CLR 358, 380-81 [71]-[72] (French CJ); Chief Justice James Spigelman, ‘Seen to be Done: the Principle of Open Justice – Part II’ (2000) 74 *Australian Law Journal* 378, 380.

¹⁹⁰ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 86 [93].

¹⁹¹ Moore, above n 152, 194.

registrars, and especially is this so when it is known that the ethics of the court prohibit it. It is recognised that there are compartments in an integrated institution. In the same way, it is not said, and cannot be said, that when a judge declines to sit on a case because of a judge's private knowledge of it or connection with one of the parties, the disqualifying element is within the court itself as an institution. Confidence is not then impaired when another judge sits on the case.¹⁹²

There is simply no way to say for certain how the reasonable observer would view judicial mediation; or, perhaps more to the point, how appellate courts will view the practice. There are simply too many variables involved: the extent to which the mediation process is prescribed, the mediation techniques adopted, and the use or otherwise of mitigating strategies, to name but a few. For the reasons identified by Justice Moore and Chief Justice Black, however, and bearing in mind the (probable) lack of a formal mediation procedure, it is hard to conceive of a situation in which judicial mediation could lead to the conclusion that the judiciary as an institution 'no longer is, and no longer appears to be, independent and impartial;'¹⁹³ as opposed to the conclusion that an individual judge has exceeded the limits of his/her discretionary power (undermining the rule against bias).

The application of the integrity concept

The second reason that judicial mediation is unlikely to undermine the integrity concept is that the High Court has indicated a resolute unwillingness to invalidate

¹⁹² Black, above n 136, 942.

¹⁹³ *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 86 [93].

legislation on this basis.¹⁹⁴ No legislative provision or rule of court vested in a Ch III courts has ever been held invalid on the basis that it undermines the integrity of the judiciary, and on only one occasion has legislation conferring powers on a federal judge been held invalid on the basis that it was incompatible with the co-exercise of judicial power.¹⁹⁵ State legislation has twice been held invalid on the basis that it undermines ‘institutional integrity,’¹⁹⁶ but only in respect of provisions affecting the criminal process. No civil function has ever been set aside on the basis that it undermines institutional integrity.¹⁹⁷ Since ‘the guarantee involved in the vesting of judicial power ... is at its most important’¹⁹⁸ in criminal matters, and in matters involving close relations between the judiciary and the government, the likelihood of judicial mediation provisions undermining integrity in any context is extremely low.

In addition, the High Court will ordinarily read down an impugned provision so as to afford it a definition within the scope of legislative power.¹⁹⁹ As explained in Chapters 4 and 6, the courts have repeatedly applied this principle in all matters of constitutional interpretation; even in respect of statutory provisions which have the effect, in substance, of directing the exercise of judicial power.²⁰⁰ In light of the conclusions drawn in the first half of this Chapter, it is doubtful that a provision or rule establishing judicial mediation could not be read down in accordance with this

¹⁹⁴ See above Chapter 4 nn 212-47, Chapter 6 nn 225-46, and accompanying text.

¹⁹⁵ *Wilson v Minster for Aboriginal and Torres Strait Islanders* (1996) 189 CLR 1, 18-19 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

¹⁹⁶ *Kable v DPP* (NSW) (1996) 189 CLR 51; *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40.

¹⁹⁷ Indeed, the *Kable* doctrine has only ever been considered once in respect of a civil function, in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 252 ALR 471.

¹⁹⁸ *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 581 (Deane J).

¹⁹⁹ *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153, 180 (Isaacs J); *A-G (Victoria) v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J).

²⁰⁰ *Nicholas v The Queen* (1998) 193 CLR 173; *Baker v The Queen* (2004) 223 CLR 513; *Fardon v Attorney General (Qld)* (2004) 223 CLR 575; *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532.

presumption. Of course, it is always possible that concerns such as those voiced by Kirby J in *Baker v The Queen* (that, ‘constitutional doctrine ... requires the measurement of the challenged legislation as it could operate in fact; not a narrow approach befitting consideration of the validity of regulations made under a *Dog Act*’)²⁰¹ will influence the High Court’s application of the integration principle in future. Even if this were to occur, however, judicial mediation will still be valid provided (as argued in the preceding section) that it does not lead reasonable members of the public to conclude the court is no longer an independent and impartial tribunal.

The object of the integrity concept

More importantly still, finding judicial mediation provisions to be invalid would be inconsistent with the object of the integrity concept and Ch III more generally. The rule of law ‘lies at the heart of the Judicature provided for in the Constitution,’²⁰² and an essential condition in maintaining the rule of law is the High Court’s power to regulate and enforce the requirements of Ch III. The judicial process implication is an extension of the separation doctrine, which, in turn ‘draws decisive force from our inherited legal traditions and the need to promote the supremacy of law over Parliament’.²⁰³ The judicial process implication serves this purpose by securing ‘to the courts a guaranteed measure of control over their own procedures at the expense of Parliament’.²⁰⁴ Likewise, it has been argued that the ultimate object of the *Kable*

²⁰¹ *Baker v The Queen* (2004) 223 CLR 513, 536 [56].

²⁰² *APLA Ltd v Legal Services Commissioner* (2006) 224 CLR 322, 440-41 (Kirby J, dissenting). See also: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193; *Plaintiff 157/2002 v Minister for Immigration* (2003) 211 CLR 476 [103]-[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

²⁰³ Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’, (1997) 23(2) *Monash University Law Review* 248, 253. See also; Suri Ratnapala, ‘Australian Constitutional Law (2nd ed, 2007) 162.

²⁰⁴ Fiona Wheeler, *Ibid* 253.

doctrine is to secure the High Court at the apex of an integrated Australian judiciary. This overarching object was achieved in partnership with a series of cases that brought the courts of the territories under the umbrella of Ch III (collectively referred to in Chapter 6 as the ‘integration’ principle).²⁰⁵ While the High Court has been reluctant to expand the incompatibility component of the *Kable* doctrine (by exercising its appellate jurisdiction to protect the inherent jurisdiction of inferior courts), this does not detract from the fact that it may do so. In all instances (federal, State and territory), it is the *capacity* of the High Court (and the judiciary more generally) to protect the integrity of judicial processes that is critical.

Thus, the integrity concept maintains the rule of law by safeguarding the judiciary’s inherent power to protect the integrity of its own processes.²⁰⁶ This realisation is crucial in the current context, because judicial mediation does nothing to interfere with this power. In *Nicholas v The Queen*, it was the *removal* of the courts discretionary power to exclude certain evidence that (in McHugh and Kirby JJ’s view) threatened the integrity of the judiciary.²⁰⁷ In *Kable* and *Re Criminal Proceeds*, it was the *limitation* placed upon the power to ensure procedural fairness that was incompatible with the institutional integrity of the Australian judiciary.²⁰⁸ In contrast, the statutory provisions/court rules necessary to implement judicial mediation fall within that category of provision, identified in Chapter 4, which *increase* the

²⁰⁵ *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29; *Lamshed v Lake* (1958) 99 CLR 132; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361; *Spratt v Hermes* (1965) 114 CLR 226; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591; *Teori Tau v Commonwealth* (1969) 119 CLR 564; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; *Kruger v Commonwealth* (1997) 190 CLR 1; *Wurridjal v Commonwealth* (2009) 237 CLR 309; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

²⁰⁶ Wendy Lacey, ‘Inherent Jurisdiction, Judicial Power, and Implied Guarantees under Chapter III of the Constitution’ (2003) 31 *Federal Law Review* 57.

²⁰⁷ (1998) 193 CLR 173, 222 [115] (McHugh J), 258 [201], 264 [210] (Kirby J).

²⁰⁸ *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40, 45 [11].

discretionary power of the court.²⁰⁹ In such circumstances there is no threat to the judiciary's power to ensure fairness in proceedings, and no reason not to interpret the implementing provision in accordance with the assumption that it will be performed judicially. Judicial mediation does not undermine the purpose of the judicial process implication or the *Kable* doctrine. Indeed, it may further the rule of law by improving access to independent and impartial tribunals.

²⁰⁹ *Cominos v Cominos* (1972) 127 CLR 588; *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617; *Femcare Ltd v Albright* (2000) 100 FCR 331; *Truman v Truman* (2008) 216 FLR 365; *Crestin v Crestin* (2008) 39 Fam LR 420.

CONCLUSION

The object of this thesis has been to determine whether Ch III of the Commonwealth Constitution limits the ability of Australian judges to engage in judicial mediation and, if so, whether those limits will affect the development of judicial mediation in practice. It is concluded that, although certain features of the common law judicial process, and conditions necessary for the exercise judicial power, are impliedly required by Ch III, this implication neither alters the operation of these features and conditions nor does it place any relevant restriction upon the prehearing functions that may vested in, or carried out by, Australian courts or judges. As such, Ch III will not prohibit the development of judicial mediation.

Judicial mediation can be implemented consistently with Ch III

The High Court has utilised the separation of powers doctrine (whether embodied in the strict ‘separation doctrine’ or the weaker ‘incompatibility’ concept) as a means of securing four jurisdictions which are essential to the rule of law. These jurisdictions reflect the need to ensure judicial impartiality and enable the judiciary to fulfil its constitutional obligations; they do *not* prevent the judiciary from adapting its processes in a manner conducive to the attainment of these obligations. Exclusive jurisdiction serves to isolate the judicial function from legislative interference or usurpation, thereby ensuring access to independent and impartial tribunals. This jurisdiction is perhaps the most conspicuous of the four jurisdictions identified, flowing as it does from the explicit terms of Ch III. Inherent jurisdiction further limits the ability of the government to interfere with the independence and impartiality of

the judiciary, by securing to the judiciary the ability to ensure procedural fairness and the integrity of its own processes. This jurisdiction derives from the separation doctrine and the vesting of exclusive jurisdiction in Ch III courts, and is transferred in a diluted form to State and territory courts by the *Kable* doctrine (adopting a less demanding test of incompatibility). Appellate jurisdiction ensures an avenue of appeal to the High Court from all Australian courts, thereby providing the High Court with a minimum level of substantive and procedural oversight in order to maintain a single and coherent Australian common law. This jurisdiction is prescribed by s 73 in respect of Ch III and State courts, and has been extended to territory courts by the *Spratt* stream. Supervisory jurisdiction safeguards judicial sovereignty in all spheres of Australian dispute resolution, thereby enabling the judiciary's constitutional imperative to authoritatively determine the law. This jurisdiction is closely related to appellate jurisdiction, but derives not from s 73 but from the exclusive vesting of judicial power under s 71. This is because, were private dispute resolution practitioners (principally arbitrators) able to make authoritative declarations of law, or to pass binding decisions in circumstances abhorrent to all notions of procedural fairness, the object of s 71 would be jeopardised.

Of these jurisdictions, only inherent jurisdiction has anything to say about judicial mediation, and it is *within* this jurisdiction that judicial mediation has so far developed. Whether, as seems likely, judicial mediation continues to develop at the judiciary's own motion (in the form of court rules of practice directions), or whether governments encourage courts to mediate (in the form of primary legislation), the constitutional protection of inherent jurisdiction will only limit the development of judicial mediation to the extent that, in practice, it exceeds the boundaries of

acceptable judicial conduct. These boundaries cannot be determined prescriptively, and will fluctuate in accordance with contemporary mores.

This point is critical, because judicial mediation does not *ipso facto* threaten procedural fairness or the integrity of the judicial process. Once judicial mediation is properly conceptualised as a variation on established prehearing processes, and the fallacies of rigid procedural distinctions between adjudication and mediation are dispelled, the argument that judicial mediation is somehow antithetical to notions of due process and judicial integrity collapses. Judicial mediation may well undermine the rule against bias in certain circumstances, but so could directions hearings, conciliation conferences, settlement conferences, interlocutory proceedings, less adversarial trials, and, for that matter, final hearings. The risk of apprehended bias is omnipresent in all aspects of judicial work, yet we do not claim that the mere presence of this risk is somehow cancerous to procedural fairness. Nor is there any evidence that public perceptions of the judiciary (however this might relate to notions of integrity) have been tarnished by an increase in judicial management or the integration of ADR and the formal court system. We countenance the possibility of apprehended bias or negative public perceptions arising because it is a practical necessity that we do so, and because it is the sanctity of the judiciary's appellate jurisdiction (as opposed the activities of individual judges) that ultimately ensures procedural and institutional integrity (ergo impartiality). On the rare occasion that judicial mediation *is* held to breach procedural fairness or undermine judicial integrity, the judicial error leading to this finding could, would, and should be remedied through the exercise of appellate jurisdiction.

Critique of the High Court's interpretive approach

The conclusion that Ch III does not prohibit judicial mediation, and that this accords with the rule of law assumptions upon which the Constitution is founded, should not be taken as a whole-hearted endorsement of the High Court's approach to Ch III. A number of criticisms have been noted throughout this thesis; including the superficial classification of all governmental powers as exclusively judicial, executive or legislative, the prohibition on advisory opinions, and the development of the *persona designata* exception. These criticisms are amply demonstrated and explored in the existing literature, and need not be restated here. One further criticism, however, less widely reported, relates to the interpretive approach adopted by the High Court in respect of legislative provisions encroaching upon judicial power. The High Court's attachment to a presumption in favour of legislative validity is evident in its treatment of legislation affecting Ch III courts, judges acting *persona designata*, and State and territory courts. The inflexible application of this presumption, far from serving the separation of powers by avoiding the 'confusion of public business', is detrimental to the rule of law and threatens to undermine the constitutional protections carefully crafted during the Mason CJ and Brennan CJ eras.

By reading down legislation in favour of validity the High Court has placed absolute responsibility for the maintenance of independence and impartiality on the judiciary. In accordance with this approach, it is for individual judges (and ultimately appellate courts) to determine what is, and is not, 'judicial'. In respect of legislation that increases discretionary power this is entirely appropriate; it is unquestionably for the judiciary to determine the boundaries of acceptable judicial practice. And, insofar as this approach is receptive to the development of novel methods of judicial dispute

resolution which seek to improve access to justice (such as judicial mediation), it serves the rule of law. Moreover, by allowing legislatures to increase judicial discretion in certain instances (subject to the requirements of procedural fairness and inherent jurisdiction), this approach encourages a productive working relationship between governments and courts, without any perceptible danger to the separation of powers.

In contrast, when a presumption in favour of validity is applied to sanction what are, in pith and substance, legislative directions adversely affecting individual rights and liberties (by effectively *removing* judicial discretion in relation to essential matters of procedure), it ‘makes a mockery’ of the separation of powers. *Nicholas, Fardon, Baker*, and *Gypsy Jokers* all show that, while legislation will ordinarily stop short of positively directing the exercise of judicial power, judges may be nevertheless compelled by an overriding objective to secure a specific governmental agenda – often targeted at achieving a particular outcome in individual cases. It is well established that statutory interpretation should focus on substance as well as form – especially in relation to legislation affecting individual rights and liberties – yet in recent years the High Court has been resolutely unwilling to do so. It was on this basis that Kirby J dissented in all but one of the judgments noted above.

It seems entirely appropriate that, generally speaking, a different interpretive approach should be adopted in respect of legislation that removes or limits the discretionary power of judges (securing a specific governmental agenda), on the one hand, and legislation that increases the procedural discretionary power of judges (such as would be necessary to implement judicial mediation), on the other. The latter poses no threat

to the separation of powers, as judges must still act ‘judicially’. The former poses a very real threat to the separation of powers, as it effectively allows the government to direct the outcome of judicial proceedings. This distinction is important, because unless the proper tools of construction are used to maintain the protections built upon Ch III, these protections risk being washed away in the first high tide.

The Future of Judicial Mediation

The future of judicial mediation is not guaranteed, of course, simply because it is constitutionally permissible. How far towards the mediation end of the ‘procedural continuum’ the judicial process travels, and the extent to which judicial mediation develops as an ostensibly discrete prehearing function, will depend upon myriad factors transcending strict legal theory. For example, will judges make good mediators, and will disputants want judges to mediate anyway? A limited amount of research exists in these areas,¹ but more detailed data is required. The potential for judicial mediation to increase settlement rates and improve disputant satisfaction will also entail the implementation of appropriate referral criteria. A model that responds to research targeted specifically at the registry in question is likely to prove more successful than a ‘one size fits all’ solution. Success will also depend upon the quality of mediator training, and the internal administration of the courts (should courts assign certain judges to mediate in all matters, or will all judges have the option to mediate?) There is also an ongoing debate as to how mediators should be accredited, the standards that should be applied, and whether mediation should be mandated. These debates transcend the current context, but also have implications for it.

¹ See, for example, Harry Edwards, ‘Alternative Dispute Resolution: Panacea of Anathema’ (1986) 99 *Harvard Law Review* 668; Richard Ingleby, *In the Ball Park: Alternative Dispute Resolution and the Courts* (Carlton: Australian Institute of Judicial Administration, 1991).

These questions are important, but they are administrative in nature, and have the potential to obfuscate the more important question of how we construct our civil justice system in the first place. In any event, the future of judicial mediation need not involve the development of discrete processes so defined. The significance of this thesis, it is hoped, lies not in the narrow conclusion that judicial mediation is constitutionally valid, but in the broader proposition that prehearing processes can expand into facilitative and evaluative models of dispute resolution without exceeding the boundaries of Ch III. These processes may amount to a form of judicial mediation in theory, but this classification, in and of itself, is of far less importance than what judges actually do in practice. Whatever names become fashionable for the next generation of prehearing process, Ch III remains the watchful parent; supervising from a distance, intervening only when real harm threatens.

APPENDIX

Letter from Judge Margaret Sidis to Iain Field, 20th August 2009



New South Wales Government
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Dear Mr Field,

I write in reply to your email sent to my Associate on 12 August 2009 in relation to your questions on judicial mediation.

1. *What the source of power for the conduct of judicial mediations is/was (for example, did the programme spring from any specific rule/practice direction, or simply the overriding objectives of the Civil Procedure Act?).*

There is no specific provision in the *Civil Procedure Act* or in the *Uniform Civil Procedure Rules*.

Section 61 of the *Civil Procedure Act* makes general provision for the court to give such directions as it thinks fit for the *speedy determination of the real issues between the parties*. Section 26 empowers the court to refer matter for mediation.

2. *How the process was conducted in practice (were there any specific guidelines, or was the process entirely discretionary?).*

For every mediation there are 5 specific rules, these are:

1. All persons present, including the judge, lawyers, experts and parties **must** sign a Mediation Agreement that binds them to maintaining the confidentiality of everything said and done during the mediation.
2. The judge does not give legal advice.
3. The judge does not make any decisions or rulings. The judge's function is to assist the parties to come to their own resolution of their dispute.

4. All notes taken by the judge are shredded at the conclusion of the mediation. Only the signed agreement will remain on the court file as evidence of the commitment to confidentiality.
5. The judge will not hear the case if the mediation is not successful. The file will be marked "Not to be Listed before Judge X"

In addition the parties are required to have present at the mediation the persons who are responsible for the ultimate decision concerning the resolution of the dispute. I regret to say that insurance companies do not always comply with this requirement.

3. *Whether the trial project is now complete, and if so whether there are plans to introduce a more permanent program.*

The trial is now complete. Registrars of the Court have now been trained and are mediating cases on a permanent basis. However, judges still mediate in special cases.

4. *Whether any statistical information was gathered as to the 'success' of the project.*

The statistics indicate a high success rate of about 95%. Registrars are currently settling more than 50% of their matters.

[REDACTED]

Sincerely,

M Sidis
District Court Judge

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